United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon-Quality Line Pipe from Korea

First Written Submission of the United States

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I. INTRODUCTION

1. The United States established the safeguard measure on imports of line pipe on 1 March 2000. This action followed the determination of the U.S. International Trade Commission (USITC) that increased imports were a substantial cause of serious injury or the threat of serious injury to the domestic line pipe industry, based on an exhaustive and transparent investigation. Korean, Japanese, and German producers of line pipe participated in the investigation, and their representatives had ample opportunity at the USITC hearing on serious injury to present their views, provide relevant evidence, and review and comment on evidence presented by other parties. In its complaint and first written submission, Korea has not established any reason for the Panel to conclude that the U.S. decision to apply a safeguard measure was inconsistent with the WTO Agreement on Safeguards or the General Agreement on Tariffs and Trade 1994. Therefore, Korea has failed to meet its burden of proof as the complainant.

II. FACTUAL AND PROCEDURAL BACKGROUND

2. The USITC determined that the subject line pipe was being imported into the United States in such increased quantities as to be a substantial cause of *serious injury or the threat of serious injury*.[1] Three of the USITC's six Commissioners found that the domestic industry was seriously injured, and two found that the domestic industry was threatened with serious injury.[2] The vote of these five Commissioners constituted the determination of the USITC, which is the "competent authority" for purposes of the Safeguards Agreement.

3. The USITC's period of investigation was the five year period from 1994 through 1998. To obtain the most current data possible, the USITC also followed its practice of gathering data on the partial year following the end of the most recent year, known as the "interim period," in this case the first six months of 1999. For comparison purposes, the USITC gathered data on the same period for the preceding calendar year.

Import Levels

4. Information on virtually every factor and issue relating to the performance of the U.S. line pipe industry was nonconfidential. However, it was necessary for the USITC to treat import data as confidential because the data would have revealed confidential business information of certain purchasers of line pipe. As explained in the USITC Report (p. I-14 n. 62), the USITC Report excluded import data on certain Arctic-grade and alloy line pipe that were outside the scope of the safeguards investigation. Because a small number of firms purchased the excluded products, disclosure of the adjusted import data would have revealed confidential information about the operations of these firms. The USITC noted that the excluded line pipe accounted for less than 10 percent of the unadjusted import data, and that the adjusted data follows trends similar to those for unadjusted data contained in Table C-1 of the USITC Report. In this submission the unadjusted import data in Table C-1 is sometimes referred to as the "nonconfidential data."

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[1] *Circular Welded Carbon Quality Line Pipe*, Inv. No. TA-201-70, USITC Pub. 3261 (December 1999) p. I-3 ("USITC Report") (Exhibit USA-17).

[2] USITC Report, p. I-15 n. 66.

5. During the course of its investigation, the USITC disclosed confidential information to eligible representatives of parties who agreed to abide by its administrative protective order. Under the order, recipients of confidential information promised to prevent the disclosure of the confidential information to any person not entitled to see that information. U.S. law provides for substantial sanctions for any violation of that commitment. Persons covered by the protective order received confidential versions of submissions by both parties and nonparties, reports compiled by the USITC staff, and the USITC report. Nonconfidential versions of most of these materials, with confidential information deleted, are available for public inspection. At no time did the parties to the USITC investigation question the adequacy of the nonconfidential materials.

6. After dropping sharply between 1994 and 1995, subject imports increased in each year thereafter, and reached their highest level in 1998. The volume of subject imports grew by over 44 percent from 1997 to 1998, as the following indexed data show:[3]

	1994	1995	1996	1997	1998
imports from all countries	100	68.9	70.4	117.4	169.4

The nonconfidential data show that imports rose from 221,618 tons in 1997 to 331,379 tons in 1998.[4]

7. Imports declined slightly in interim 1999 (the first six months of 1999), as compared with interim 1998 (the first six months of 1998),[5] but they remained at such a high level that interim 1999 imports exceeded whole-year imports in both 1995 and 1996. The nonconfidential data show imports of 130,753 tons in interim 1999, compared with 157,953 tons in interim 1998.[6]

8. Imports measured relative to domestic production followed a similar pattern. After falling from 1994 to 1995, relative imports increased each year thereafter, nearly doubling in 1998, and then reaching their highest level in interim 1999.

Performance of the Domestic Industry

9. In addition to the increases in the volume of line pipe imports, the USITC found, based upon its comprehensive evaluation of the data indicative of prices, that imports typically sold for prices lower than those for comparable U.S. products (the USITC describes this situation as "underselling") and

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[3] These data are contained in Table 1 to the letter from United States Re: Panel's Request for Information (16 February 2001) ("February 16th Letter").

[4] USITC Report, p. C-4, Table C-1. As used in this brief, "tons" refers to short tons.

[5] As explained below, the USITC generally only compares data in interim periods with the identical months of another year, so as to avoid distortions that could arise because of seasonal variations. This is the USITC's traditional practice in all of the USITC's trade remedy investigations.

[6] USITC Report, p. C-4, Table C-1.

forced U.S. prices downward.[7] As the volume of these low-priced imports increased, they gained market share at the expense of the domestic industry. The domestic industry's market share declined from 77.3 percent in 1997 to 65.9 percent in 1998, and was 71.1 percent in interim 1998 as compared to 67.0 percent in interim 1999. (These are nonconfidential data, which follow the same trend as the confidential information.)[8]

10. Coincident with the increases in imports' volume and market share, the U.S. producers' sales declined from 838,000 tons in 1997 to 728,000 tons in 1998, and from 397,000 tons in interim 1998 to 273,000 tons in interim 1999.[9] Likewise, domestic shipments of line pipe declined from the 1997 level of 753,000 tons to 640,000 tons in 1998, and from 389,000 tons in interim 1998 to 266,000 tons in 1999.[10]

11. Consistent with the loss of sales and consequent declines in domestic shipments, domestic production declined from 882,000 tons in 1997 to 670,000 tons in 1998, with 413,000 tons in interim 1998 as compared to 282,000 tons in interim 1999.[11] Notwithstanding the declines in domestic production, the ratio of inventories to domestic production rose irregularly from 8.3 percent in 1994 to 10.9 percent in 1998, and from 9.7 percent at the end of June 1998 to 14.1 percent at the end of June 1999.[12] While capacity followed an irregular pattern and rose slightly during the investigation period,[13] the industry's capacity utilization rate reflected the declines in production, falling from 74.0 percent in 1997 to 58.9 percent in 1998, with 62.9 percent in interim 1998 as compared to 39.8 percent in interim 1999.[14]

12. The USITC further found that the domestic industry's financial performance deteriorated beginning in 1998, as import volume and market share increased.[15] In 1998, the year of the sharp and sudden import increase, five of the 14 domestic firms operated at a loss in their line pipe operations, and five additional firms had reduced operating incomes. In interim 1999, all 14 firms had reduced operating

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[7] USITC Report, p. I- 24-25

[8] USITC Report, p. C-3, Table C-1.

[9] USITC Report, p. I-17. Complete data regarding domestic sales over the entire period of investigation can be found in Table 9 on p. II-27 of the USITC Report.

[10] USITC Report, p. I-17. Complete data regarding U.S. shipments over the entire period of investigation can be found in Table 2 on p. II-13 of the USITC Report.

[11] USITC Report, p. I-16. Complete data regarding domestic production over the entire period of investigation can be found in Table 4 on p. II-20 of the USITC Report.

[12] USITC Report, p. I-20. Complete data regarding the domestic industry's inventories over the entire period of investigation can be found in Table 7 on p. II-24 of the Staff Report.

[13] USITC Report, p. I-17. Complete data regarding the domestic industry's capacity over the entire period of investigation can be found in Table 5 on p. II-22 of the Staff Report.

[14] USITC Report, p. I-17. Complete data regarding capacity utilization over the entire period of investigation can be found in Table 5 on p. II-22 of the USITC Report.

[15] USITC Report, p. I-18-19.

incomes compared with interim 1998, and ten of the 14 firms operated at a loss. This was in marked contrast to the domestic industry's financial performance in 1995 through 1997, when the industry as a whole was more profitable and fewer or no producers operated at a loss.[16] The domestic industry's ratio of operating income to net sales declined from 8.1 percent in 1997 to 2.9 percent in 1998, with 6.7 percent in interim 1998 and a *negative* 11.4 percent in interim 1999.[17] Research and development expenditures by the domestic industry fell each year, and were at their lowest level in 1998.[18]

13. Employment-related indicators fell sharply in 1998 and interim 1999. The domestic workforce producing line pipe fell from 1,519 workers working 3.4 million hours in 1997 to 1,286 workers and 2.6 million hours in 1998, with 1,476 workers working 1.6 million hours in interim 1998 and 1,066 workers working 1.1 million hours in interim 1999. Total wages paid declined from $67.9 million in 1997 to $54.3 million in 1998, with $32.4 million in interim 1998 and $21.6 million in interim 1999.[19] Industry productivity fluctuated during the period examined with no apparent trend.[20]

14. While the USITC found that the industry's capital expenditures rose during the period investigated, it attributed this increase to the time lag between capital spending decisions and the actual outlay that is typical of the line pipe industry. As the USITC observed, there was evidence in the record that 1998 capital spending reflected analysis and decisions that preceded the surge in imports in 1998, and that some capital spending had been postponed or canceled in 1998.[21]

Analysis of Other Factors Affecting the Domestic Industry, Including Conditions in the Oil and Gas Industries

15. The USITC gave careful consideration to the argument that the decline in demand for line pipe caused by reduced oil and natural gas drilling and production activities was a more important cause of the line pipe industry's serious injury than increased imports. The USITC acknowledged that there was a substantial decline in demand for line pipe between 1998 and 1999 due to reduced oil and natural gas

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[16] USITC Report, p. I-18. Complete data regarding the domestic industry's financial performance over the entire period of investigation can be found in Table 9 on p. II-27 of the USITC Report.

[17] USITC Report, p. I-19.

[18] USITC Report, p. I-20.

[19] USITC Report, p. I-19. Complete data regarding employment-related indicators over the entire period of investigation can be found in Table 8 on p. II-24 of the Staff Report.

[20] USITC Report, p. I-19. Complete data regarding the domestic industry's productivity over the entire period of investigation can be found in Table 8 on p. II-24 of the Staff Report.

[21] USITC Staff Report, p. I-20 and n. 122. We note that capacity and capital expenditures are not among the factors listed in Article 4.2(a) of the Safeguard Agreement which authorities are specifically required to evaluate.

drilling and production activity, and that this decline contributed to the serious injury experienced by the domestic industry in 1998-1999.[22]

16. For several reasons, however, the USITC did not find that the decline in oil and natural gas activities was a greater contributing factor to the industry's serious injury than the increased imports. As a preliminary matter, the USITC questioned whether line pipe demand was as closely tied to oil and gas drilling and production activities as respondents claimed, and to what extent line pipe was used in gathering, transmitting and distributing oil and gas.[23]

17. The Commission found that from 1994 to 1996 the domestic industry had experienced comparable levels of declining demand. In 1994, the domestic industry had experienced only slight operating losses, and in 1995 and 1996, the domestic industry had been healthy. The USITC concluded that another factor must have accounted for the much lower level of industry performance under comparable demand conditions in the latter period. The USITC found that the most significant difference in market conditions between the later period and the 1994 through 1996 period was the increasing presence of imports in the market.[24]

18. Moreover, reduced line pipe demand due to reduced oil and natural gas drilling and production activity did not explain the dramatic shift in market share from domestic suppliers to imports. It also did not explain the substantial decreases in line pipe prices that occurred in 1998 and 1999. These price declines did not disproportionately affect line pipe grades that were typically used in oil and gas "gathering" applications, but occurred across the spectrum of line pipe products.[25]

19. The USITC also considered several other possible causes of serious injury, but did not find that any other cause was a greater cause of serious injury than increased imports.[26] It found that competition among domestic producers had always been a factor in the market and did not explain the recent severe decline in domestic prices and shipments. Although two firms began production of line pipe in 1998, and industry capacity increased irregularly by a modest amount from 1994 to 1998, the increase in capacity was considerably less than the increase in domestic consumption during the same period.[27]

20. While it appeared that some domestic producers had shifted from production of oil country tubular goods ("OCTG," another type of pipe often produced in the same facilities as line pipe) to other pipe products, the USITC found that it was not clear that they had switched to the production of line pipe

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[22] USITC Report, p. I-28.

[23] USITC Report, p. I-27-28. The USITC found that line pipe is most sensitive to changes in oil and gas prices when used for gathering (*i.e.*, the application closest to the wellhead), less sensitive when used for transmitting (*i.e.*, conveyance of oil and gas nationally and regionally), and least sensitive when used for distributing oil and gas (*i.e.*, conveyance of oil and gas at the local level to end users). USITC Report, p. II-44.

[24] USITC Report, p. I-28-30.

[25] USITC Report, p. I-29.

[26] USITC Report, p. I-30-32.

[27] USITC Report, p. I-30.

as opposed to standard pipe or some other type of pipe not covered by this investigation. Therefore, the USITC did not find that the record supported a finding that domestic producers shifted from OCTG production to line pipe production in such substantial quantities as to be a more important cause of serious injury than the imports.[28]

21. The USITC found that, although the decline in exports in 1998 and interim 1999 exacerbated the serious injury caused by increased imports, it was not a more important cause of serious injury than the imports. The increase in imports in 1998 was considerably larger than the decline in exports.[29]

22. The USITC also found that increases in per-unit allocated overhead and selling, general and administrative expenses ("SG&A") resulting from declines in the production of other pipe products such as OCTG were not mistakenly or disproportionately attributed to line pipe, but were allocated based on acceptable allocation methodologies. The USITC also considered whether declines in raw material costs accounted for the decline in line pipe prices, in particular the 1998 and interim 1999 decline in the price of hot-rolled carbon steel, the main raw material used in the production of line pipe. The USITC noted that, overall, raw material costs were generally stable during 1994 to 1998, except for a temporary increase in 1995. The unit cost of goods sold was 5 percent lower in interim 1999 as compared to interim 1998, which was considerably less than the almost 25 percent decline in the unit value of imports in interim 1999 as compared to interim 1998. Thus, the USITC concluded that the decline in raw material costs did not explain the decline in prices in interim 1999.[30]

Recommendation of a Safeguard Measure by the USITC

23. After the USITC rendered its findings on serious injury or threat thereof, it conducted a further inquiry regarding a remedy to address the serious injury and facilitate the domestic industry's positive adjustment to import competition. All Commissioners participated in the proceedings. In accordance with U.S. law, those who supported the affirmative determination were then entitled to recommend action by the United States to remedy the serious injury and facilitate adjustment. The majority recommended a four-year tariff-rate quota ("TRQ"), subjecting any imports in excess of 151,124 tons to a 30 percent duty in the first year, with the measure becoming progressively more liberal over its duration.[31] Their recommended measure excluded Canada, Mexico, and a number of developing countries. The minority recommended a four-year tariff on all imports, starting at 12.5 percent in the first year and becoming progressively lower, with Canada and a number of developing countries excluded.[32]

24. In October 1999, the USITC announced its determination that increased imports of line pipe were a substantial cause of serious injury or threat of serious injury to the domestic line pipe industry. Five

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[28] USITC Report, p. I-30-31.

[29] USITC Report, p. I-31.

[30] USITC Report, p. I-31-32.

[31] USITC Report, p. I-4.

[32] USITC Report, p. I-5. One of the Commissioners who found threat of serious injury, Commissioner Askey, excluded Mexico from the recommended measure.

Commissioners voted in favor of that determination, three of them (the "majority") on the basis that imports caused serious injury and two of them on the basis that imports caused the threat of serious injury. Commissioner Crawford dissented from the determination.[33] Under U.S. law, the dissent does not form part of the determination of the USITC or the explanation of the basis of the determination.[34]

25. The USITC transmitted a report to the President, which consisted of its report and various staff reports, for the President's use in deciding whether to impose a safeguard measure. In December 1999, the USITC published its report in the investigation, which included the determination, the Commissioners' findings and conclusions in support of that determination, and recommendations on action for the President of the United States to take in response to the determination.[35] The published report also included the dissenting views of Commissioner Crawford.

Actions by the President

26. The United States provided notifications to the WTO Committee on Safeguards under Article 12 at each stage of the proceeding.[36] In particular, it identified the majority's recommendation as the proposed measure, and the recommendation of an alternative remedy by Chairman Bragg and Commissioner Askey.[37]

27. The President's staff reviewed the materials transmitted by the USITC following its final determination and conducted meetings with parties both in favor of and opposed to imposition of a safeguard measure. In addition, the United States conducted consultations with Korea on 24 January 2000.

28. On the basis of the information gathered through this process, the President concurred with the USITC on the need for a safeguard measure. However, he decided to modify the recommendation. The President reduced the length of the measure to three years, and chose a duty of 19 percent rather than a TRQ with no in-quota duty and a 30 percent out-of-quota duty. In addition, the President granted each country exporting to the United States a 9000 ton exemption from the duty.

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[33] USITC Report, p. 3.

[34] Trade Act of 1974, as amended, Section 202(f)(2) ("Trade Act") (Exhibit USA-1). Section 202 is codified at 19 U.S.C. § 2251, *et seq.*

[35] *See generally* USITC Report.

[36] G/SG/N/6/USA/7 (6 August 1999); G/SG/N/8/USA/7 (11 November 1999); G/SG/N/8/USA/7/Suppl.1 (25 January 2000) ("January Notification").

[37] January Notification, item 4.

29. The President announced the safeguard measure on 11 February 2000 and published the proclamation implementing the measure on 23 February 2000.[38] The measure took effect on 1 March 2000.[39]

30. The United States conducted consultations with the European Communities and Japan regarding the provision of compensation pursuant to Article 8 SGA. As a result, it reached agreement with both Members to maintain their rights with regard to the safeguard measure and that the 90-day period provided under Article 8.2 SGA would expire on 1 March 2003.[40]

31. Korea requested consultations with the United States on 13 June 2000, pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article 14 of the WTO Agreement on Safeguards ("Safeguards Agreement" or "SGA"), and Article XXII:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"). Korea's consultation request alleged that the U.S. safeguard was inconsistent with Articles 2, 3, 4, 5, 11, and 12 and Articles I, XIII, and XIX.[41]

III. SUBSTANTIVE ARGUMENT

A. Burdens Of Proof

1. Korea, As Complainant, Bears the Burden of Proof to Establish a *Prima Facie* Case That the United States Acted Inconsistently With Its Obligations.

32. As demonstrated in this submission, the United States fully complied with its obligations under the *Marrakesh Agreement Establishing the World Trade Organization* ("WTO Agreement") in applying the safeguard measure on line pipe. Under the WTO Agreement, Korea as the complainant now bears the burden of proof to demonstrate otherwise, and unless it meets that burden, the line pipe safeguard is presumed to be consistent with the WTO Agreement. Korea has failed to meet its burden to establish a *prima facie* case with respect to the claims contained in its panel request, as it relies in large measure on unfounded assertions advanced without supporting evidence or legal grounding.

33. In *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India,* the Appellate Body noted that "a party claiming a violation of a provision of the *WTO Agreement* by another Member must assert and prove its claim."[42] Addressing the same question in the context of a safeguard

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[38] Proclamation 7274, 65 F.R. 9193 (23 February 2000).

[39] *Ibid.*

[40] G/L/382, G/SG/N/12/USA/5; G/SG/N/12/JPN/2 (6 June 2000); G/L/376, G/SG/N/12/EEC/5, G/SG/N/12/USA/3 (3 May 2000).

[41] Unless otherwise indicated, all references to Arabic numbered Articles are to the Safeguards Agreement, and all references to Roman numeral Articles are to GATT 1994.

[42] *United States – Measures Affecting Imports of Woven Wool Shirts and Blouses from India,*
(continued...)

measure, the *Korea – Dairy* panel found that "[a]s a matter of law the burden of proof rests with the European Communities, as complainant, and does not shift during the panel process."[43]

34. The *Korea – Dairy* panel also noted that it fell to the EC, as the complainant, to submit a *prima facie* case of violation of the Safeguards Agreement.[44] That panel concluded further that once the EC made its *prima facie* case, it was for Korea (the defending party in that dispute) to present its own evidence and arguments showing that it had complied with the requirements of the Safeguards Agreement at the time of its determination.[45] The *Korea – Dairy* panel then concluded that "[a]t the end of this process, it is for the Panel to weigh and assess the evidence and arguments submitted by both parties in order to reach conclusions on whether the EC claims are well-founded."[46] The Appellate Body affirmed the Panel's application of the burden of proof.

35. As will be discussed below, Korea has failed to offer legally sufficient evidence and arguments to meet its burden of proof. To the extent that it offers any claims that are both legally germane and accompanied by sufficient argumentation, the United States rebuts those claims below.

2. Korea's Unjustified Request for Confidential Information Does Not Excuse Its Failure to Meet Its Burden of Proof.

36. As outlined in greater detail below in Section IV.A, Korea has failed to establish that the voluminous confidential information it has requested is either necessary or appropriate to the Panel's evaluation of Korea's claims pursuant to Article 13.1 DSU. The United States has already responded to the Panel's request for information in its letter of February 16, 2001. The United States believes that this information, together with the other nonconfidential information on the record before the panel, provides sufficient basis for the Panel to evaluate Korea's claims. Should the Panel consider that additional information is necessary and appropriate, the United States stands ready to assist it in identifying appropriate information.

37. Indeed, Korea's general assertion that the Panel is hampered in its review of the USITC's determination that the domestic industry was seriously injured "because much of the record data is

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[42] (...continued)
WT/DS33/AB/R, Report of the Appellate Body, adopted 25 April 1997, para. IV *("U.S. – Wool Shirts")*.

[43] *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R, 21 June 1999, para. 7.24 (*"Korea – Dairy (Panel)"*).

[44] *Korea – Dairy (Panel)*, para. 7.24. As the Appellate Body has noted, a *prima facie* case is "one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the prima facie case." *European Communities – Measures Concerning Meat and Meat Products,* WT/DS26 and 48/AB/R, Report of the Appellate Body, adopted 13 February 1998, para. 104 (*"EC – Hormones (AB)"*).

[45] *Korea – Dairy (Panel)*, para. 7.24.

[46] *Korea – Dairy (Panel)*, para. 7.24.

confidential"[47] is plainly untrue. Virtually all of the data underlying that finding are in the USITC's public report. The only factors listed in Article 4.2(a) for which the data are confidential are the market share figures, research and development expenses, and industry capital expenditures. The market share information can be derived from the indexed, non-confidential summaries provided by the United States. Since Korea has not raised any issues concerning the research and development and capital expenditure data, the Panel's ability to conduct its examination of the USITC determination is not impaired.

38. Since Korea has not made a *prima facie* case on its claims, the Panel has no basis to consider that the United States has taken action inconsistent with the WTO Agreement. Therefore, any request for confidential information at this stage would put the United States in the position of proving the consistency of its action with the Safeguards Agreement and GATT 1994 even though Korea has not proven otherwise. In essence, Korea is asking the Panel to presume that the United States measure is inconsistent with U.S. WTO obligations, thus reversing the well-established burden of proof that the *complainant* bears the burden of proving inconsistency with the WTO Agreement.

B. The Proper Application of the Standard of Review: Objective Assessment of Action by the Competent Authorities and Action by Members in Applying A Safeguard Measure.

39. Article 11 of the DSU directs panels to make an objective assessment of the facts of the case and of the applicability and conformity with the relevant covered agreements. With regard to fact-finding, "the applicable standard is neither *de novo* review as such, nor 'total deference.' "[48] This standard applies to all obligations under GATT 1994 and the Safeguards Agreement. However, the inquiry may differ depending on the type of obligation the panel is assessing.[49]

40. The Safeguards Agreement obligations on the application of safeguard measures fall into two categories: those requiring action by the competent authorities of the Member and those requiring action by the Member itself. The objective assessment conducted by the Panel must conform to the requirements placed on each entity.

1. Objective Assessment of Action by the Competent Authorities

41. The competent authorities conduct the investigation described in Article 3.1, which includes a public hearing or other means for interested parties to present their views, on issues including whether a safeguard measure would be in the public interest. Article 4.2(a) establishes that the competent authorities evaluate all relevant factors bearing on the situation of the industry. Article 4.2(b) requires that the investigation demonstrate the causal link between increased imports and serious injury. Articles 3.1 and 4.2(c) require that the competent authorities then publish a report setting forth their findings and

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[47] Korea's First Written Submission, para. 218.

[48] *EC – Hormones (AB)*, para. 116, n. 111.

[49] *E.g., Argentina – Safeguard Measures on Imports of Footwear*, Report of the Appellate Body, WT/DS121/AB/R, para. 121 ("*Argentina – Footwear (AB)*") ("[T]he Panel was obliged, by the very terms of Article 4, to assess whether the Argentine authorities had examined all the relevant facts and had provided a reasoned explanation of how the facts supported their determination.").

reasoned conclusions, as well as a detailed analysis of the case and demonstration of the relevance of the factors examined.

42. Thus, the "objective assessment" of actions by the competent authorities focuses on the consistency of the investigation and determination with the requirements of Articles 3 and 4. As the panel in *Argentina – Footwear* explained:

> our review will be limited to an objective assessment, pursuant to Article 11 of the DSU, of whether the domestic authority has considered all relevant facts, including an examination of each factor listed in Article 4.2(a), of whether the published report on the investigation contains adequate explanation of how the facts support the determination made, and consequently of whether the determination made is consistent with Argentina's obligations under the Safeguards Agreement.[50]

The Appellate Body has endorsed this standard,[51] and other panels have followed it. In each case, the panels have specifically rejected the notion that panels may review *de novo* the determination made by the domestic investigating authority.[52]

2. Objective Assessment of Action by a Member in Deciding Whether and How to Apply a Safeguard Measure.

43. In contrast, the Member itself decides whether and how to apply a safeguard measure and, under Article 5, bears the obligation to ensure that it does so only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment. The Member makes the decision under Article 6 whether to apply a provisional safeguard measure. The Member also both conducts consultations with other

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[50] *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/R, para. 8.124 (25 June 1999) ("*Argentina – Footwear (Panel)*"). Similarly, the *Korea – Dairy* panel concluded that:

> the Panel's function is to assess objectively the review conducted by the national investigating authority, . . . an objective assessment entails an examination of whether the [Korean competent authority] had examined all facts in its possession or which it should have obtained in accordance with Article 4 of the Safeguards Agreement (including facts which might detract from an affirmative determination in accordance with the last sentence of Article 4.2 of the Safeguards Agreement), whether adequate explanation had been provided of how the facts as a whole supported the determination made, and, consequently, whether the determination made was consistent with the international obligations of Korea.

Korea – Dairy (Panel), para. 7.30.

[51] *Argentina – Footwear (AB)*, paras. 116-117.

[52] *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/R, para. 8.5 (31 July 2000) ("*US – Wheat Gluten (Panel)*"); *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/R, WT/DS178/R, para. 7.1 (6 December 2000) ("*US-Lamb Meat*").

Members under Articles 8 and 12.3 and provides the notifications required under Article 12. There is no requirement for the Member to conduct public hearings or issue a report on its decisions with regard to these obligations.

44. In considering the Member's compliance with Article 5.1 in *Korea – Dairy*, the Appellate Body adopted an approach different from the one applied to determinations by the competent authorities. Instead of looking to the published report, it found that the recommendations or determinations in a safeguard proceeding *need not* justify the type or extent of safeguard measure applied by the Member, except in the limited circumstance of a quantitative restriction that reduces the quantity of imports below the average of imports in the last three representative years.[53] The application of different standards must have been intentional, as *Argentina – Footwear* and *Korea – Dairy* were issued on the same day.

45. The difference makes sense. The competent authorities must gather evidence, permit the interested parties to present evidence and argumentation, and publish a report. Therefore, a panel's review a serious injury determination focuses on the consideration of the evidence and the analysis contained in the report. In contrast, as the Appellate Body recognized in *Korea – Dairy*, those procedural requirements do not apply to the Member in its imposition of a safeguard measure. Therefore, a panel's analysis of the Member's application of a safeguard measure is not confined to the investigation or the report, but may include a Member's *ex post* justification of why the measure was permissible at the time of application.

3. Korea is Seeking a *De Novo* Review That is Prohibited by the Standard of Review As Applied To Either Type of Action.

46. To a substantial degree, Korea's arguments reflect a misunderstanding of the standard of review. As we discuss below, a great deal of its argumentation simply presents another view of the facts, rather than showing that the findings made by the USITC or the decision by the United States to apply a safeguard measure was in any way inconsistent with the Safeguards Agreement or Article XIX. Such argumentation improperly seeks to have the Panel make its own *de novo* interpretation of the record.

47. Moreover, in several instances, Korea goes further and seeks to present to the Panel evidence that was not before the USITC to refute the USITC's findings. We have described these instances in detail in the request for preliminary ruling in Section IV.B of this submission. Since these documents and allegations were not part of the USITC's record, Korea is trying to have this Panel conduct exactly the analysis that panels and the Appellate Body have criticized in every safeguards dispute – a *de novo* review of the underlying facts.

48. Korea errs further in attempting to impugn the U.S. decision to apply a safeguard measure on the basis of events that occurred after that decision was taken. Our request for preliminary ruling in Section IV.B of this submission also addresses the impropriety of this type of argument. As the *Korea - Dairy*

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[53] *Korea – Definitive Measure on Imports of Certain Dairy Products*, Report of the Appellate Body, WT/DS98/AB/R, paras. 99 and 103 (14 December 1999) ("*Korea – Dairy (AB)*") ("However, we reverse the Panel's broad finding, in paragraph 7.109 of its Report, that Article 5.1 requires a Member to explain, at the time it makes its recommendations and determinations concerning the application of a safeguard measure, that its measure is necessary to remedy serious injury and to facilitate adjustment.").

panel emphasized, a panel "shall examine whether *at the time of the determination* all factors listed in Article 4.2 were appropriately considered . . . ."[54] Obviously, it was impossible for the USITC to consider information that did not exist at the time of its determination and, therefore, such information cannot form the basis for a finding that its actions were inconsistent with the Safeguards Agreement.

C. Korea Has Not Established Any Basis For The Panel To Conclude That The USITC Determination Was Inconsistent With Articles 3 and 4 of the Safeguards Agreement.

49. Korea asserts that the USITC's serious injury determination fails to comply with Articles 3.1 and 4.2(c) of the Safeguards Agreement, because much of the record data on which this determination is based are confidential, and because the Commissioners of the USITC were not unanimous in finding serious injury.[55] Neither of these arguments has any merit.

50. Article 3.1 of the Safeguards Agreement states that: "[t]he competent authorities shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law." Article 4.2(c) stipulates that: "[t]he competent authorities shall publish promptly, in accordance with the provisions of Article 3, a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined."

51. Section IV.B, below, demonstrates that Korea has presented no grounds for the Panel to conclude that confidential information is necessary to understand the findings and conclusions of the USITC.

52. Contrary to Korea's argument, the fact that the Commissioners of the USITC were not unanimous in their injury findings does not render that determination inconsistent with Articles 3.1 or 4.2(c). Articles 3 and 4 of the Safeguards Agreement impose requirements on the "competent authorities of a Member" reach their decisions. The Safeguards Agreement does not address the question of how the "competent authorities of a Member." This is a matter left to the Member.

53. Under U.S. law the competent authority for making serious injury determinations is the United States International Trade Commission ("USITC").[56] U.S. law does not require that decisions of the USITC be unanimous.[57] The decisions of the five Commissioners who made affirmative findings in this case constitute the only determination of the USITC. The views of the one Commissioner who made a negative decision do not constitute, and are not a part of, a determination of the USITC.[58]

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[54] *Korea – Dairy (Panel)*, para. 7.55.

[55] Korea's First Written Submission, paras. 215-224.

[56] *See* Section 202(b)(1)(A) of the Trade Act of 1974, which states that the USITC shall conduct safeguards investigations, and 201(a) of the Trade Act of 1974, which describes the action which the U.S. President is required to take if the USITC determines that the prerequisites for applying a safeguards measure have been met.

[57] Section 330(d)(5) of the Tariff Act of 1930, as amended (Exhibit USA-2). Section 330 is codified at 19 U.S.C. § 1330.

[58] *See* Trade Act, § 202(f)(2)(C).

54. Article 3.1 of the Safeguards Agreement provides that the "competent authorities shall publish a report setting forth *their* findings and reasoned conclusions . . . ." Since the views of the Commissioner who found in the negative do not constitute a determination of the USITC, and thus of the competent authorities, the United States is not required by Article 3.1 to publish the views of the dissenting Commissioner. Indeed, the United States is not obligated under the Safeguards Agreement to publish the results of a competent authorities' votes (if it conducts votes) or to disclose the existence of any dissenting views. Nor are the competent authorities required to make or publish recommendations as to the safeguard measure. The United States' obligations are satisfied with the publication of a report setting forth the serious injury determination made by the competent authorities. The fact that the United States has disclosed more than is required of it by the Safeguards Agreement does not increase the burdens imposed on it by the Safeguards Agreement.

55. Thus, the fact that a Commissioner whose views do not form part of the determination did not agree with that determination does not undermine the decision of the five Commissioners who made affirmative findings, which collectively constitutes the determination of the USITC, and thus of the United States.

56. Nor does the fact that two Commissioners found increased imports to be a substantial cause of threat of serious injury undermine the finding of the three Commissioners who found such imports to be a substantial cause of present serious injury. The difference between a finding of serious injury and one of threat is a matter of degree and timing; it does not involve Commissioners coming to opposite conclusions. "Threat of serious injury" is defined by Article 4.1(b) of the Safeguards Agreement as serious injury that is "clearly imminent." Many of the factual findings made by the two Commissioners who found threat of serious injury echo those of the three Commissioners who found present serious injury. The Commissioners did not reach contrary findings of fact. After evaluating and weighing the many factors involved in the injury analysis, the Commissioners making affirmative injury findings merely came to somewhat different conclusions as to the timing of when serious injury had occurred or would occur.

57. Korea's argument concerning the Commissioners who made affirmative injury findings also fails because the Safeguards Agreement does not require the competent authorities of a Member to choose between serious injury or the threat thereof. Article 2 permits a Member to impose a safeguard measure if that Member has determined that a product is being imported in such quantities and under such conditions "as to cause *or* threaten to cause serious injury to the domestic industry." The Safeguards Agreement does not require to choose between serious injury or threat thereof. Indeed, the five Commissioners making affirmative findings in the *Line Pipe* investigation might each have found "serious injury or the threat thereof" (without specifying which), and their collective determination would still have been consistent with the requirements of Article 2 of the Safeguards Agreement.

58. In sum, the United States complied fully with its obligations under Articles 3.1 and 4.2(a) of the Safeguards Agreement in reaching its determination of serious injury to the domestic industry. The USITC Report contains extensive data for each relevant economic factor, and these data were thoroughly and systemically examined by the USITC, as described above. In other words, the USITC Report

provides "reasoned conclusions" on "all pertinent issues," and this report contains "a detailed analysis," including "a demonstration of the relevance of the factors examined."[59]

D. Korea Has Not Established Any Basis for the Panel to Conclude That the USITC'S Determination of Increased Imports Is Inconsistent With Article 2 of Safeguards Agreement.

1. Introduction

59. Article 2.1 of the Safeguards Agreement provides that:

> A Member may apply a safeguard measure to a product only if that Member had determined, pursuant to the provisions set out below, that *such product is being imported into its territory in such increased quantities, absolute or relative to domestic production*, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products. (footnote omitted) (emphasis added).

60. The USITC found that after declining between 1994 and 1995, imports on an absolute basis increased each year thereafter, and rose sharply in 1998. Although imports declined modestly from interim 1998 to interim 1999, they remained at very high levels; the USITC stressed that imports in interim 1999 exceeded in just 6 months the levels of full year 1995 and 1996 imports.[60]

61. Imports relative to domestic production also declined between 1994 and 1995, but then rose each year thereafter. The ratio of imports to domestic production nearly doubled in 1998, and reached its highest level in interim 1999.[61]

62. Korea contends that the USITC violated Article 2.1 of the Agreement on Safeguards because imports did not increase either absolutely or relative to domestic production.[62] As an initial matter, Korea ignores that the Agreement does not require an increase in both the absolute quantities of imports *and* the quantities relative to domestic production. Rather, Article 2.1 of the Safeguards Agreement explicitly states that the product should be imported in such increased quantities, absolute *or* relative to domestic production. This disjunctive language is unambiguous, and, under the customary rules of interpretation reflected in the Vienna Convention, must be read according to its ordinary meaning,[63] *i.e.*, that a Member may apply a safeguard measure to a product that has been imported in either absolute

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[59] *See United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, Report of the Appellate Body, WT/DS166/AB/R, para. 160 (22 December 2000) ("*US-Wheat Gluten (AB)*").

[60] USITC Report, p. I-14.

[61] USITC Report, pp. I-14-15.

[62] Korea's First Written Submission, para.192.

[63] Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, Art. 31.1 ("Vienna Convention").

increased quantities or increased quantities relative to domestic production. Therefore, to meet the burden of proof establishing that the USITC improperly found an increase in imports, Korea would have to establish that there was neither an absolute increase nor an increase relative to domestic production.

63. Korea has not met this burden. As a matter of law, Korea has not pointed to any provision of the Safeguards Agreement that requires the examination of consecutive six-month periods to evaluate the increase in imports. And, as a factual matter, the evidence shows that imports did increase at the end of the investigation period.

2. There Was a Recent, Sudden, Sharp, and Significant Increase in Imports, Both in Absolute and Relative Terms.

a. The Increase in Imports Was in the "Recent Past."

64. The USITC collected and evaluated data, including import data for a period of five full years plus the first six months of 1999. In analyzing the import data, the USITC paid particular attention to the most recent part of the period of investigation, the full year 1998 and interim 1999. The USITC noted that imports "rose sharply" in 1998 on an absolute basis, and "nearly doubled" relative to domestic production. The USITC recognized that imports, on an absolute basis, declined somewhat from interim 1998 to interim 1999, but it put this decline in perspective by noting that imports remained at very high levels in interim 1999, exceeding in six months total imports in both 1995 and 1996. Moreover, on a relative basis, imports in interim 1999 were at their highest level of the entire five-and-a-half year period of investigation.[64]

65. Korea attempts to refute the USITC's finding by crafting its own preferred period to assess increased imports, which it deems to be the last six months of 1998 and the first six months of 1999. Korea would have the Panel focus exclusively on this period and ignore all other data, including the most recent full-year data for 1998. Korea would contrive the period to show a decline in imports. It can only do so by limiting the examination to two six-month increments (*i.e.*, the first half of 1998, the second half of 1998, and the first half of 1999).

66. The USITC, consistent with its longstanding practice in safeguards investigations (as well as antidumping and countervailing duty investigations), collected import and domestic industry data enabling it to make year-to-year comparisons. The USITC customarily gathers and evaluates import data on a calendar year basis with extra data on interim periods,[65] and not on the basis of arbitrarily defined snapshots of time. That the USITC followed its long-standing approach in examining increased imports demonstrates neutrality and lack of bias in its analysis. The use of interim-period-to-interim-period comparisons for 1998 and 1999 was consistent with its long-standing practice and, unlike Korea's proposed alternative methodology, not chosen to achieve a particular result. A comparison of "mismatched" interim periods could create distortions because of seasonal changes in market conditions. Under the applicable standard of review pursuant to Article 11 of the DSU, this Panel should not re-

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[64] USITC Report, pp. I-14-15.

[65] There may be cases where there is a reason for deviating from the calendar year. For example, in cases involving agricultural products it may be more rational to collect data on a crop year basis. There was, however, no such reason to depart from a calendar year basis in this case.

weigh the evidence before the USITC, and should not disturb the USITC's findings so long as they are objective.[66]

67. The 12-month period of investigation suggested by Korea would not permit an investigating authority to conduct the analysis required by the Safeguards Agreement. Articles 2.1 and 4.2(a) contemplate a comparative evaluation of imports over time, and a one-year period would hardly suffice. A determination of whether imports have increased could not, by its very nature, be static. In order to determine whether the product has been imported in increased quantities either absolutely or relative to domestic production, the competent authority must look at the quantities both for the imports and for production of the domestic like product over a period of years.

68. Korea essentially is arguing either that the Safeguards Agreement mandates the use of the abbreviated period to assess increased imports, or that the Panel should substitute its judgment for that of the USITC as to what constitutes the appropriate period for assessing increased imports. Both arguments fail.

69. Nothing in the Safeguards Agreement compels the use of any particular period, let alone the arbitrarily-defined period advocated by Korea. Article 2 states that the determination is to be made "pursuant to" the other provisions set out in the Agreement. Article 4.2(a) likewise does not specify any particular analysis or period of investigation, but requires that competent authorities evaluate all relevant factors of an "objective and quantifiable nature" having a bearing on the situation of the industry, including "the rate and amount of increase in imports of the product concerned in absolute and relative terms." The ordinary meaning of the term "objective" is "neutral or unbiased."[67] As long as the competent authorities base their determination concerning increased imports on objective, *i.e.* unbiased, data, it meets the Agreement's requirements concerning the evaluation of import data to address the question of increased quantities of imports.

70. On the other hand, if Korea is asking the Panel to substitute its judgement for that of the USITC as to the appropriate period for assessing whether there were increased imports, Korea's argument also must be rejected. Such *de novo* review of this issue by the Panel would be inconsistent with the appropriate standard of review.

b. The Absolute Increase in Imports

71. In absolute terms, subject imports declined in the second year of the period of investigation, but then increased in each subsequent year, culminating in a large increase in 1998. The nonconfidential data show that imports rose from 221,618 tons in 1997 to 331,379 tons in 1998.[68] This increase in imports in 1998 most certainly was a "sudden and sharp increase" in the "recent past."

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[66] *See Korea–Dairy (Panel)*, para. 7.24.

[67] *See* The New Shorter Oxford English Dictionary, Clarendon Press 1993 (defining *objective* as "presenting facts uncoloured by feelings, opinions or personal bias").

[68] USITC Report, p. C-4, Table C-1.

72. The decline in imports between interim 1998 and interim 1999 was relatively modest and irregular, and imports remained at high levels. In other words, the decline over the interim periods did not negate the sudden and sharp increase in imports that immediately preceded it. Imports in the six months of interim 1999 were still greater than *full year* 1995 or 1996 imports.

73. Even the import data for the 12-month period urged by Korea would not support its argument. Korea makes various assertions regarding the import data that are simply incorrect. Korea states that "imports declined continuously for a full 12 months prior to the determination by the ITC;"[69] that "during the "recent past" -- i.e., the interim six month period of 1999 -- imports *declined*;"[70] and that imports "had already begun a steady, sustained pattern of decline over four quarters."[71] As explained in the USITC Report, monthly import data show that imports actually increased toward the end of interim 1999. In May, June and July 1999, monthly import volumes were again at levels comparable to the very high levels of 1998.[72] Thus, it is wrong to say that imports "declined continuously" for a full 12 months," or that they declined "during" interim 1999, or that they showed "a steady, sustained pattern of decline" over four quarters. Korea has failed to meet its burden of proof to show that there was not an absolute increase in imports.

74. In sum, it is clear that there was an recent, sudden, sharp, and significant increase in the absolute levels of imports in the recent past. Even if there were not, however, the requirements of Article 2.1 of the Safeguards Agreement would be satisfied. Article 2.1 requires that there be increased imports, "absolute *or* relative to domestic production." As explained below, the increase in imports relative to domestic production extended into interim 1999.

c. The Relative Increase in Imports

75. As with absolute import levels, imports relative to domestic production declined in 1995, but rose in each subsequent year, and nearly doubled in 1998. The level of relative imports continued to increase in interim 1999, when it rose to its highest level.

76. Korea claims that nonconfidential data show that imports relative to domestic production declined over the interim periods.[73] This is incorrect. The nonconfidential data show that the ratio of imports to domestic production rose from 38.26 percent in interim 1998 to 46.33 percent in interim 1999.[74]

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[69] Korea's First Written Submission, para.194.

[70] Korea's First Written Submission, para. 202 (emphasis in original) .

[71] Korea's First Written Submission, para. 205.

[72] USITC Report, pp. I-29 and I-48 n.90.

[73] Korea's First Written Submission, para. 207.

[74] *See* USITC Report, p. C-4, Table C-1. The percentages are derived by dividing the total quantity of imports by U.S. producers' production quantity in each period, as follows: 157,953/412,872 = 38.26 percent for interim1998; 130,753/282,247 = 46.33 percent for interim 1999.

77. Korea criticizes the USITC for comparing data from the first half of 1998 to data from the first half of 1999 in concluding that imports relative to domestic consumption rose to their highest level in interim 1999, and suggests that the USITC should have compared the first six months of 1999 with the last six months of 1998.[75] As noted above, the USITC traditionally compares interim periods consisting of the same months. Comparing comparable interim periods is the USITC's traditional practice, which it uses in all trade remedy investigations; it did not choose these months to "capture" any particular trend in imports.

78. In sum, it is clear that there was an increase in imports relative to domestic production in the recent past. This relative increase alone fully satisfies the requirements of Article 2.1 of the Safeguards Agreement.

3. The USITC's Findings Of Increased in Imports Are Consistent With the Decisions of the Panel and the Appellate Body in *Argentina-Footwear.*

79. To support its argument that imports did not increase, Korea relies on the Appellate Body's statement in *Argentina-Footwear* that "recent" imports must be examined in connection with the increased imports criterion, and that the investigation period should be the "recent past."[76] The Appellate Body did not specify what period would qualify as "recent" and suggested that the investigation period should be long enough for the competent authorities to discern trends.[77]

80. The USITC's decision is consistent with these standards. Although the USITC's investigation covered a five-and-one-half-year period, the USITC clearly paid special attention to the most recent import levels and trends, those in 1998 and in interim 1999. It noted that the subject imports increased in each of the last three years of the period of investigation. In the last full year of the period of investigation, imports increased in absolute terms by over 44 percent, and nearly doubled relative to domestic production.

81. The circumstances which concerned the Panel and Appellate Body in *Argentina-Footwear* are simply not present in this case. In that dispute, the subject imports declined for three consecutive years before the imposition of the safeguards measure. Imports declined continuously both in absolute terms and relative to domestic production.[78] The magnitude of those declines was significant; the Panel noted that "between 1993 and 1996, the absolute volume of imports declined by 38 percent, and the ratio of imports to production was nearly halved, from 33 percent to 19 percent."[79] Thus, an increase in imports could only be found on an end-point-to-end-point basis (between 1991 and 1995), but not in the

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[75] Korea's First Written Submission, para. 208.

[76] Korea's First Written Submission, para. 197.

[77] The Appellate Body stated: "we do not dispute the Panel's view and ultimate conclusion that the competent authorities are required to consider the *trends* in imports over the period of investigation (rather than just comparing the end points) under Article 4.2(a). *Argentina-Footwear (AB)*, para.129.

[78] *Argentina-Footwear (Panel)*, paras. 8.153 and 8.155.

[79] *Argentina-Footwear (Panel)*, para. 8.160.

intervening trend over the period of investigation nor in the last three years of the investigative period.[80] It was in the context of rejecting this end-point-to-end-point method of finding an increase in imports that the Appellate Body directed a focus on the "recent past."

82. Korea's method of breaking out annual import data in such a way as to capture a brief and slight decline in imports is as arbitrary and results-oriented as the end-point-to-end-point comparison that the Panel found lacking in *Argentina-Footwear*.[81]

83. Korea has failed to show, as a matter of law, that the period it proposed for assessing increased imports is mandated by the Safeguards Agreement or by Appellate Body and panel decisions interpreting the Agreement. It also has failed, as a factual matter, to show that there was not an absolute or relative increase in imports based on the USITC's traditional method of collecting import data. In sum, Korea has failed to meet its burden of making a *prima facie* case that the increase in imports required by Article 2.1 of the Safeguards Agreement did not occur.

E. The USITC's Determination of Serious Injury Caused by Increased Imports Is Consistent With Article 4 of The Safeguards Agreement.

84. After determining that line pipe was imported in increased quantities, the USITC evaluated the relevant factors having a bearing on the situation of the domestic line pipe industry to determine whether that industry was either seriously injured or threatened with serious injury, and if so, whether that injury or threat was caused by the increased imports. After a thorough and objective evaluation of the evidence, the USITC answered both questions in the affirmative, determining that the increased imports caused serious injury to the domestic industry. In addressing these questions, the USITC fully complied with U.S. obligations under Article 4 of the Safeguards Agreement.

1. Significant Overall Impairment in the Position of the Domestic Industry

85. In determining that the domestic industry was seriously injured, the USITC relied on the domestic safeguards statute, which defines "serious injury" identically to the Safeguards Agreement definition, *i.e.*, as "a significant overall impairment in the position of the domestic industry."[82] The USITC evaluated all enumerated factors set out in Article 4.2(a) and "other" factors that it found to be relevant, including capacity, shipments, inventories, capital expenditures, research and development expenses, and prices.[83]

86. As described in detail above, virtually all of the factors demonstrated a significant overall impairment in the domestic industry's condition beginning in 1998. Based on its objective and complete evaluation of these factors, the USITC concluded:

> In view of the sharp declines in 1998 and interim 1999 in virtually all domestic industry indicators, including domestic industry production, capacity utilization, shipments, sales,

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[80] *Argentina-Footwear (Panel)*, para. 8.153.

[81] *Argentina-Footwear (Panel)* paras. 8.153-8.165.

[82] Safeguards Agreement, Article 4.1(a).

[83] USITC Report, pp. I-15 through I-20, and pp. I-38-44.

> market share, financial performance, employment, hours worked, and wages paid, and the increase in inventories, we find that the domestic industry is seriously injured.[84]

Korea's submission completely disregards this overwhelming evidence of serious injury.

87. Korea's argument that a one-year downturn from a historical high in an industry should not be viewed as a "significant overall impairment" of the industry[85] has no basis in the Safeguards Agreement. Article 4.1(a) of the Agreement defines "serious injury" as "a significant overall impairment in the position of the domestic industry." As Korea itself explains, the word "impair" is defined as "to weaken or make worse, to lessen in power," "overall" indicates that such impairment must be widespread and comprehensive, and "position of the domestic industry" denotes its overall health."[86] The downturn experienced by the U.S. industry was sufficient to satisfy the Safeguards Agreement's requirements from serious injury or threat of serious injury caused by increased imports.

88. The record before the USITC contained extensive evidence to satisfy fully each of these components of the definition of serious injury. As explained in detail above in paragraphs 8-13, the condition of the domestic line pipe industry deteriorated greatly in 1998, and in interim 1999 as compared with interim 1998. This deterioration was observable in virtually every factor examined by the USITC and broadly affected industry participants. There is no basis for arguing that this did not amount to an "impairment" of the domestic industry, or that this impairment was not widespread and comprehensive. Korea can point to no credible evidence in the record that this impairment did not affect the domestic industry as a whole, or that the industry was affected unevenly.

a. The USITC's Methods of Collecting and Evaluating the Injury Data Was Reasonable.

89. Korea has provided neither a legal nor a factual basis that would compel the Panel to conclude that Article 4.2(a) requires the use of data that excludes all products other than line pipe.[87] As a legal matter, the provision requires the consideration of "factors" -- that is, categories of data like import volume and profitability -- and requires that they be "relevant" as well as "objective and quantifiable." However, it does not speak to how the competent authorities may quantify these factors. It certainly does not prevent the use of statistics that reflect, in part, products other than those under investigation, as long as they serve to quantify the factor in question with respect to the product in question.

90. In collecting and evaluating the injury data with respect to line pipe, the USITC recognized that most of the producers of this product also made other types of pipe, including OCTG, standard pipe, and structural pipe.[88]

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[84] USITC Report, p. I-20.

[85] Korea's First Written Submission, paras. 245-251.

[86] Korea's First Written Submission, para. 247.

[87] Korea's First Written Submission, paras. 226-236.

[88] USITC Report, p. II-25.

91. The USITC addressed the Korean and Japanese respondents' arguments that the production of other pipe products by the line pipe producers would affect the line pipe industry's performance indicators. It explained:

> The Commission carefully evaluated company allocation methods in the course of tabulating questionnaire and other data. In the case of line pipe that was double or triple stenciled, allocations were made on the basis of the product's end use and other acceptable accounting methodologies. See report at II-31. Commission staff verified the allocations of two of the largest firms and found them satisfactory.[89]

92. For the large majority of the factors considered by the USITC, Korea has failed to provide any reason to believe that the production of other pipe products in the U.S. producers' facilities affected the data. Statistics on domestic production, shipments, sales, market share, and inventories of line pipe are all wholly unaffected by the allocation issues raised by Korea. In fact, the only flaws that Korea alleges go to capacity utilization and profitability, an implicit acknowledgment by Korea that other factors were not affected.[90]

93. Some allocation issues will always be present in a safeguards investigation involving a product that is made in productive facilities also used to produce other products. The fact that certain allocations are necessary does not imply that a Member has failed to evaluate industry-specific factors "of an objective and quantifiable nature," as required by Article 4.2(a) of the Safeguards Agreement. As noted above, the USITC carefully evaluated company allocation methods and verified the allocations of two of the largest U.S. producers.

94. With respect to capacity utilization, the USITC recognized that this factor "may not be as certain a measure of injury in this industry as compared to others, given the ability of domestic producers to shift production among various pipe products."[91] It concluded nevertheless, that "the sharp decline in capacity utilization is consistent with other indicators of poor domestic industry performance in 1998 and interim 1999 and supports an affirmative determination of serious injury."[92] In other words, in addition to carefully scrutinizing allocation methods, the USITC also indirectly tested the data by its consistency with other trends and found it to be reliable.

95. The USITC specifically addressed Korea's arguments that low production quantities and sales of OCTG distorted the profitability data on the line pipe industry. The USITC explained:

> We are satisfied that increases in per-unit allocated overhead and SG&A resulting from declines in the production of other pipe products such as OCTG were not mistakenly or disproportionately attributed to line pipe. Increases in per-unit overhead and SG&A were allocated by the domestic producers in proportion to their sales of end products or based on other acceptable allocation methodologies. As indicated above, the Commission

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[89] USITC Report p. I-16 n.75.

[90] Korea's First Written Submission, para. 226.

[91] USITC Report, p. I-17 n.85.

[92] USITC Report, p. I-17 n.85.

verified the data furnished by two of the largest domestic producers of line pipe and found the allocations made to be reasonable.[93]

96. Korea's argument with respect to the domestic industry's profitability data rests entirely on a faulty premise. Korea asserts that OCTG shipments declined much more severely than shipments of line pipe and other pipe products made by the U.S. firms.[94] These disproportionate declines in OCTG shipments were significant, according to Korea, because U.S. producers allocated fixed costs to the various products they produced in proportion to their sales of the end-product. In other words, if sales of OCTG declined to a much greater degree than sales of line pipe, a disproportionate share of costs would be attributed to line pipe.[95]

97. Korea's only evidence for the proposition that OCTG sales fell disproportionately is Commissioner Crawford's statement (which is not part of the determination of the competent authorities of the United States) that net shipments of welded OCTG products "collapsed altogether between September 1998 and March 1999."[96] Commissioner Crawford based this statement on data of the American Iron and Steel Institute ("AISI") contained in a memorandum prepared by the USITC's staff (INV-W-247).[97] These data, as reflected in two charts, show that line pipe shipments declined precipitously, at the same time and virtually to the same degree as OCTG shipments, in late 1998 and early 1999.[98] OCTG shipments stayed at depressed levels for slightly longer than line pipe shipments, but the two products showed similar and nearly simultaneous trends. There is thus no basis for Korea's argument that a disproportionate share of fixed costs were allocated to line pipe, thereby distorting the financial results of the line pipe industry.

98. Furthermore, Korea's argument assumes that the largest component of average unit costs consisted of fixed costs. Operating leverage (as discussed on p. II-26 of the USITC Report) generally refers to the ability to increase profitability by an amount that is more than proportionate to the increase in sales volume. This is achieved by spreading fixed costs over a larger volume of products. Because raw material and direct labor are generally variable costs, the most significant contributors to operating leverage are the fixed portions of factory overhead and selling, general, and administrative expenses. Despite operating leverage explaining a portion of the changes in profitability during the period examined, the majority of average unit costs (raw material and direct labor) were ultimately variable and therefore

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[93] USITC Report, p. I-31.

[94] Korea's First Written Submission para. 229 (quoting from USITC Report, Crawford Dissenting Views on Injury, p. I-69 n.67) (footnote omitted).

[95] Korea's First Written Submission, para. 234.

[96] USITC Report, p. I-69 n.67

[97] The public version of this memorandum is attached as Exhibit USA-3.

[98] As noted above, U.S. shipments of welded line pipe declined from 752,824 tons in 1997 to 640,061 tons in 1998, and from 388,844 tons in interim 1998 as compared to 265,757 tons in interim1999. USITC Report, p. C-4, Table C-1.

could not be directly influenced by changes in production volume.[99] Thus, even if there had been a disproportionately large decline in OCTG sales – and Korea has produced no record evidence of this – the effect that this could have had on average unit costs for line pipe was nominal.

b. Contrary to Korea's Assertions, "Extraordinary Charges" Incurred By Two Individual Producers Did Not Significantly Affect Data on the Profitability of the Domestic Industry As A Whole.

99. There is no merit to Korea's claim that the U.S. line pipe industry's profitability was "skewed by the peculiar problems of certain producers." Korea identifies only Lone Star Steel and Geneva Steel (out of 14 firms in the domestic industry) as allegedly experiencing problems "unrelated to their line pipe production or line pipe imports." [100]

100. Korea's argument betrays its misunderstanding. Article 4.2(a) requires an examination of the situation of the entire industry, and not of individual firms. To remove these two firms from the analysis, as Korea suggests, would distort data for the industry.[101]

101. Korea cites the statements of Commissioner Crawford (the dissenting Commissioner, whose views, as explained above, are not part of the determination of the competent authorities) with respect to these two firms, but misquotes her. In connection with charges incurred by Lone Star Steel, Commissioner Crawford stated that the domestic industry's operating income "*may be somewhat* misleading."[102] Commissioner Crawford did not conclude that Lone Star had "misallocated" charges, or that this resulted in "a substantial reduction in the level of operating income in the industry as a whole," as Korea claims.[103]

102. However, the severe deterioration in the domestic industry's financial condition was not the result of any accounting decision by Lone Star Steel. In 1998, five of the 14 domestic producers operated at a loss in their line pipe operations, and five additional firms had reduced operating incomes. In interim 1999, 10 of the 14 firms operated at a loss, and all had reduced operating incomes, compared with interim 1998. Over the entire period investigated, the domestic line pipe industry's operating income levels tracked its sales of line pipe. These sales declined 13.0 percent in volume and 13.8 percent in value in 1998.[104]

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[99] USITC Report, p. II-28, Table 10.

[100] Korea's First Written Submission, para. 237.

[101] As the panel found in *Korea – Dairy*, the proper inquiry is "whether adequate explanation had been provided of how the facts as a whole supported the determination made, and, consequently, whether the determination made was consistent with the international obligations" of the Member applying the measure. *Korea – Dairy (Panel)*, para. 7.30.

[102] USITC Report, p. I-63 (emphasis added).

[103] USITC Report, p. I-63.

[104] *See* USITC Report, p. II-27, Table 9.

103. With respect to Geneva Steel, Commissioner Crawford explained her view that the firm's shutting down of a blast furnace and filing for bankruptcy "reflect the competitive conditions faced by Geneva Steel in its primary markets of hot-rolled sheet and cut-to-length plate."[105] However, there was ample information on the record that the decline in that company's line pipe business played a major role in the decision to shut down one of its blast furnaces and in the company's bankruptcy.[106] Therefore, Korea's citation to Commissioner Crawford's findings does not meet its burden of proof to show that the USITC analysis of profits and losses was inconsistent with the Safeguards Agreement.

c. Korea's Argument That The Industry Was Not Seriously Injured Because Capital Expenditures Increased Is Unpersuasive.

104. Korea contends that the domestic industry was not seriously injured because the domestic industry's capital expenditures doubled in both 1997 and 1998, and increased further in interim 1999.[107] This argument is unpersuasive because, as explained above, virtually all other factors bearing on the state of the industry pointed decisively to serious injury. Also, as the USITC observed, there was evidence in the record that 1998 capital spending reflected analysis and decisions that preceded the surge in imports in 1998, and that some capital spending had been postponed or canceled in 1998.[108] The USITC noted that capital investment projects in the steel industry generally involve long lead times, to allow for project approval, obtaining financing, installation, and start-up operations.[109] As an example, the USITC noted one case where a line pipe producer bought land in 1993, began commercial discussions on a new mill in 1995, started placing equipment orders in 1997, and began commissioning the mill in mid-1999.[110] Moreover, we note that capacity and capital expenditures are not among the factors listed in Article 4.2(a) of the Safeguards Agreement which authorities are specifically required to evaluate.

d. Korea Has Not Demonstrated By Record Evidence That the Industry Was Improving At the Very End of the Period.

105. Korea argues that the domestic line pipe industry was not in a state of significant overall impairment "when the ITC made its decision."[111] This argument is flawed for several reasons.

106. The questionnaire data in the record before the USITC concerning the condition of the domestic industry covered January 1994 through June 1999, the end of the interim period. Additional evidence in the record as to the condition of the domestic industry at the time of the USITC's injury decision in October 1999 was only anecdotal. There is nothing in the Safeguards Agreement requiring competent authorities to collect comprehensive data up to the day of the decision. Indeed, it would be impossible to

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[105] USITC Report, p. I-63.

[106] Transcript of hearing, pp. 32-33.

[107] Korea's First Written Submission, para. 190.

[108] USITC Staff Report, p. I-20 and n.122.

[109] USITC Report, p. I-42.

[110] USITC Report, p. I-20 n.122.

[111] Korea's First Written Submission, para. 252.

do so. There is always a time lag between the end of the period for which the competent authorities collect data and the time of their decision. There are several reasons for this. Commercial entities from whom data must be gathered (domestic and foreign producers, importers and purchasers) are usually unable to provide up-to-the-minute information. Also, the competent authorities need enough time to meet their investigative obligations, including giving interested parties the opportunity to present evidence and views, as required by Article 3.1 of the Safeguards Agreement, and to consider carefully the evidence that has been gathered.

107. Korea's argument also fails because it rests on a mischaracterization of the evidence before the USITC. Korea claims that the very end of the period of investigation showed "a continuing decline in imports."[112] In fact, as the USITC noted in paragraph 73, imports rose in May and June of 1999, such that they were again at levels comparable to the very high monthly levels in 1998.[113]

108. Korea's reliance on price increases is improperly based on extra-record information. Korea states that:

> Domestic industry witnesses confirmed $25-$30 price increases at the ITC hearing. However, by the time of the ITC's hearing, the price increases were actually more in the range of $80 per short ton *because there were two additional price increases (announced in late 1999 and early 2000) which totaled $50 per-ton.*[114]

The USITC's injury hearing was held on September 30, 1999,[115] and thus price increases announced in "late 1999 and early 2000" would not have occurred by then. Korea thus asserts facts that were not and could not be documented in the record, concerning events outside the period of investigation. The Panel should disregard these extra-record facts.[116]

109. The earlier price increase of $25-$30 to which Korea refers, which was to have taken effect in August 1999, coincided with the imposition of antidumping duties, and the entry into effect of suspension agreements, affecting hot-rolled steel, the principal raw material used in the production of line pipe.[117] In other words, the line pipe price increase could just as likely have been to compensate for rising raw material costs as an improvement in the overall financial position of the line pipe industry.

110. With respect to all of these price increases, Korea would have this Panel conduct an impermissible *de novo* review of the underlying facts. With respect to the August 1999 price increase announcement Korea would have the Panel re-weigh all the evidence which caused the USITC to conclude that the domestic industry's declining financial performance was attributable to increased

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[112] Korea's First Written Submission, para. 254.

[113] USITC Report, p. I-29.

[114] Korea's First Written Submission, para. 261 (footnotes omitted) (emphasis added).

[115] *See* USITC Report, p. I-9 n.17.

[116] *See* our Request for Preliminary Ruling, Section IV.B, below.

[117] USITC Report at I-48 n.88. The USITC also noted that it was unclear to what extent the line pipe price increase "stuck" in the market.

imports. With respect to the price increase announcements of late 1999 and early 2000, Korea asks the Panel to consider information that was not part of the USITC's record. This is precisely the sort of analysis that panels and the Appellate Body have disapproved of in every safeguards dispute. For example, the *Korea - Dairy* panel explained, "the Panel should examine the analysis performed by the national authorities *at the time of the investigation* on the basis of the various national authorities' determinations and the evidence it has collected."[118] Obviously, it was impossible for the USITC to consider information that did not exist at the time of its determination and, therefore, such information cannot form the basis for a finding that its actions were inconsistent with the Safeguards Agreement.

111. In sum, Korea's attempts to show that the domestic industry was not suffering serious injury, because of an improvement at the end of the investigated period, are unavailing.

2. The USITC's Application of the Causation Standard Was Consistent With the Requirements of the Safeguards Agreement.

112. The Appellate Body in *Wheat Gluten* established that, in conducting their causation analysis, the competent authorities must first distinguish the injurious effects caused by increased imports from the injurious effects caused by other factors.[119] This step allows the authorities properly to attribute to increased imports on the one hand, and to other relevant factors on the other, "injury" caused by all of the factors.[120] Through this examination, authorities determine whether there is a causal link between the increased imports and serious injury such that there is a genuine and substantial relationship of cause and effect between the increased imports and serious injury or threat thereof.[121] This conclusion allows the competent authorities to consider both factors related to increased imports as well as other factors in making their injury determination.

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[118] *Korea – Dairy (Panel)*, para. 7.55.

[119] Specifically, the Appellate Body in *Wheat Gluten* described the requirements as follows:

> Article 4.2(b) presupposes, therefore, as a first step in the competent authorities' examination of causation, that the injurious effects caused to the domestic industry by increased imports are *distinguished from* the injurious effects caused by other factors. The competent authorities can then, as a second step in their examination, attribute to increased imports on the one hand, and, by implication, to other relevant factors, on the other hand, "injury" caused by all of these different factors, including increased imports . . . In this way, the competent authorities determine, as a final step, whether "the causal link" exists between increased imports and serious injury, and whether this causal link involves a genuine and substantial relationship of cause and effect between these two elements, as required by the *Agreement on Safeguards*.

United States – Wheat Gluten (AB), para. 69.

[120] *US – Wheat Gluten (AB)*, paras. 66, 69 and 72. Notably, the Appellate Body indicates (in para. 69) that as the authority attributes injury to increased imports on the one hand, it may attribute injury to other relevant factors "by implication."

[121] *US – Wheat Gluten (AB)*, para. 69.

113. Consistent with the Appellate Body's ruling, U.S. law requires the USITC to examine *both* increased imports and other factors. In its investigation of *Line Pipe,* the USITC applied the causation test specified in U.S. legislation implementing the Safeguards Agreement.[122] This test provides that "the Commission shall promptly make an investigation to determine whether an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article."[123]

114. The term "substantial cause" means a cause which is "important and not less than any other cause."[124] As such, increased imports must be both an "important" cause of the serious injury or threat, and "not less than any other cause." Thus, U.S. law requires the examination of other factors to ensure that the causal link established between the increased imports and the overall injury is substantial.[125] By evaluating other potential causes to ensure that they are not greater than the causation linked to the imports, the USITC ensures that injury caused by any, or all other factors together, is not sufficient to sever this causal link.

115. Where it is possible, as a matter of fact, to ascertain the discrete effects of increased imports and other causes, the USITC draws this distinction. Even where imports are too intertwined with other factors to ascertain their effects separately, the USITC will nevertheless determine whether another cause is more important than increased imports, even when the effects of increased imports are themselves important. Through this process, the USITC ensures that the evidence on which it establishes causation by increased imports reflects a genuine and substantial causal link.

116. In conducting its examination in *Line Pipe*, the USITC first ascertained the effects of the increased imports to determine whether they were a substantial cause of serious injury or threat thereof, while at the same time ascertaining the effects of the other factors.[126] In determining the effects of both the increased imports and the other factors, the USITC properly distinguished the effects of imports from the effects of other factors. In so doing, the USITC ensured that the effects of other factors were not attributed to the imports and established that there was a genuine and substantial relationship of cause and effect between the increased imports and the serious injury to the domestic industry. Specifically, the USITC found that increased imports of line pipe were "an important cause of serious injury"[127] and that other identified causes were not more important causes of serious injury."[128] The "substantial cause" standard applied by the USITC in its *Line Pipe* investigation thus satisfied all of the requirements of Articles 2 and 4.2 and of the Appellate Body.

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[122] USITC Report, p. I-20, *citing* Trade Act, § 202(b)(1)(B).

[123] Trade Act, § 202(b)(1)(B).

[124] Trade Act, § 202(b)(1)(B).

[125] Trade Act, § 202(b)(1)(B).

[126] *US – Wheat Gluten (AB),* para 69.

[127] USITC Report, p. I-26.

[128] USITC Report, p. I-27-32.

a. The USITC Properly Identified The Effects Of Increased Imports And Established The Causal Link Between The Increased Imports And Serious Injury.

117. In concluding that imports were an important cause of serious injury or threat thereof, the USITC examined in detail the effects of the increased imports on the domestic industry as well as the effects of other factors. Specifically, the USITC found that imports had increased substantially every year since 1996, and that the bulk of this increase occurred in 1997 and 1998.[129] The USITC Report stated that the 1998 increase in import volume was equal to about three quarters of the total volume of imports in both 1995 and 1996, respectively.[130] It stated further that the ratio of imports to domestic production nearly doubled from 1997 to 1998.[131] Moreover, the ratio reached its highest level in interim 1999.[132]

118. The USITC also found that the imports' market share rose significantly, especially during 1998 and interim 1999, at the same time that the domestic industry's condition deteriorated.[133] The largest one-year change in market share occurred between 1997 and 1998,[134] at the same time that domestic production and capacity utilization dropped sharply, resulting in substantial excess capacity in the domestic industry. Based on its evaluation of the import levels and relevant industry indicators, the USITC found that the surge in imports and consequent shift in market share from the domestic industry to imports occurred at the same time that the domestic industry went from healthy performance to a very poor performance.[135]

119. As described above, consistent with the requirements of Art. 4.2(a), the USITC properly evaluated "relevant factors having a bearing on the situation of the domestic industry" – prices, domestic production, capacity, capacity utilization, shipments, sales, market share, profits and losses, employment-related indicators, productivity, inventories, capital expenditures, and research and development expenditures.[136] The USITC concluded that the sharp increase in imports in 1998 and interim 1999 led to losses in all key industry financial indicators.[137]

120. Although prices are not one of the enumerated "relevant factors" that competent authorities are required to examine under Article 4.2(a), the USITC nonetheless treated prices as a relevant "other

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[129] USITC Report, p. I-14-15.

[130] USITC Report, p. I - 23-24.

[131] USITC Report, p. I-15.

[132] USITC Report, p. I-14.

[133] USITC Report, p. I-24.

[134] USITC Report, p. I-23-24.

[135] USITC Report, p. I-24.

[136] USITC Report, pp. I-15 through I-20, and pp. 38-44.

[137] USITC Report, p. I-26.

factor"[138] and examined price data in reaching its determinations of serious injury and causation. Contrary to Korea's assertions,[139] the USITC thoroughly evaluated the pricing data of a quantifiable and objective nature and, based on this evaluation, found that imports depressed domestic prices to a significant degree.[140] The increased imports coupled with the import-led price declines[141] caused domestic producers to lose significant sales, market share, and revenue[142] which, in turn, contributed to declines in other key indicators such as production,[143] capacity utilization[144] and employment,[145] as well as shipments,[146] productivity,[147] and operating income.[148] The USITC's examination of profit and loss data revealed that in 1998, 10 of 14 producers reported either reduced operating income or losses, compared to 1997, and all 14 showed reduced operating income or increased losses in interim 1999 compared to interim 1998.[149] While operating income declined, inventories increased[150] and declines in profitability caused the postponement or elimination of discretionary capital spending.[151]

121. Through this analysis, the USITC found that increased imports were an important cause of serious injury[152] and properly established the existence of the causal link between the increased imports and the serious injury as required by Art. 4.2(b).

i. Contrary to Korea's Assertion, There Is a Coincidence of Trends Between Imports and the Performance of the Domestic Industry.

122. Korea maintains that imports reached their highest levels during the first half of 1998, and that the deterioration of the domestic industry did not begin until the second half of 1998. Thus, Korea contends

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[138] *See US – Wheat Gluten (AB)*, para. 71.

[139] Korea's First Written Submission, para. 276-283.

[140] USITC Report, p. I-24-25.

[141] USITC Report, p. I-26.

[142] USITC Report, p. I-26.

[143] USITC Report, p. I-16.

[144] USITC Report at I-17. The steady decline in capacity utilization bore little relationship to the irregular and minimal capacity gains; rather, the decline resulted from a decline in production. The overall decline in capacity utilization far outpaced the slight increase in capacity.

[145] USITC Report, p. I-26.

[146] USITC Report, p. I-39.

[147] USITC Report, p. I-19-20.

[148] USITC Report, p. I-18-19.

[149] USITC Report, p. I-18-19.

[150] USITC Report, p. I-20.

[151] USITC Report, p. I-20.

[152] USITC Report, pp. I-14-15 and I-26.

that the USITC's causation analysis is deficient because the decline in the domestic industry's performance did not coincide exactly with the increase in imports.[153] Korea's argument is unpersuasive for several reasons.

123. First, it is not necessary for increased imports and a deterioration in the industry's condition to occur simultaneously for there to be a causal link between increased imports and injury to the domestic industry. As the Appellate Body explained in *United States – Wheat Gluten* "the term 'causal link' denotes, in our view, a relationship of cause and effect such that increased imports contribute to 'bringing about,' 'producing' or 'inducing' the serious injury."[154] The cause clearly may come some time before the effect.

124. A lag between cause and effect is to be expected in the circumstances of this industry. Imports are recorded when the merchandise arrives in the United States. Often -- such as when it is sold through a distributor, as much imported line pipe is in the United States[155] – the imported product is not sold to end users until later. But even if it were sold at the time of importation, the effects of imports on most of the injury factors (for example, production, capacity utilization, profits and losses, and employment) would not be felt until some time later. For example, the impact of lost sales would not show up in a domestic producer's financial results, or the producer would not decide to reduce its workforce, until some time after the imports are entered into the United States.

125. Second, the USITC did not compare data for the first half and second half of 1998 because it did not seek or obtain data in these increments for purposes of its analysis.[156] As explained above, the USITC collects and analyzes data in safeguards investigations in whole-year increments. The only exception to this is the collection of data for the most recent interim period, which it compares to a period comprised of the same months of the previous year. The collection and analysis of trade data on a yearly basis conforms with internationally-accepted practice. As explained above, much mischief can come from tailoring yearly data into shorter periods so as to achieve a particular result or create a desired trend.

126. Third, any disparity in the trends of imports and domestic industry performance which Korea claims to have identified was minor. The decline in imports in the second half of 1998 was slight. On an indexed basis, imports fell by only 7 percent from the first half of the year to the second half (while the domestic industry's U.S. shipments fell by 35.4 percent).[157] Given that total imports for 1998 were so

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[153] Korea also states (paragraph 268 of its submission) that underselling by imports was greatest in 1997, and cites to its own brief to the USITC to support that proposition. That brief, in turn, relies on a study that the Korean and Japanese respondents commissioned for purposes of the safeguards investigation. The USITC had the discretion to choose which data it found to be reliable, and it chose to rely on data other than what was submitted by the respondents.

[154] *US – Wheat Gluten (AB)*, para. 67.

[155] USITC Report, p. II-8.

[156] We note that there is nothing in the Safeguards Agreement requiring competent authorities to obtain data in such semi-annual increments.

[157] February 16th Letter, Table 1 (Index).

much higher than in 1997 or any previous year, the amount of imports in the second half of 1998 was still much higher than in any comparable prior period.

127. Finally, if the Panel were free to reexamine statistics on other than an interim period-to-interim period basis, Korea's "tailored" period has no greater priority than others that yield a different result. For example, an examination of the second half of the year in yet smaller increments, in quarters, reveals that the absolute decline in imports occurred only in the fourth quarter. Imports during the third quarter of 1998 were higher than in any other quarter in the entire five-and-a-half year period for which the USITC collected data.[158] Thus, even if the Panel were authorized to re-weigh the evidence (which is not the case) Korea fails to meet the burden of proof because its proposed "tailored" period has no priority over other approaches yielding contrary results.

128. Korea's argument in paragraph 271 of its submission with respect to trends in interim 1999 also does not withstand scrutiny. Imports relative to domestic production reached their highest level in interim 1999, even if they did decline somewhat in absolute terms. This high relative level of imports, at a time when the U.S. industry's condition worsened, is consistent with a causal link between increased imports and injury.[159]

129. In sum, the "negative correlation between import trends and the difficulties of the industry," which is the basis for so much of Korea's argument on causation, simply does not exist. There was no need for the USITC to "explain or justify its causation decision in light of the conflicting trends," as Korea asserts in its submission.[160] The USITC was required to reach its determination on the basis of objective evidence, and it did so.

ii. In Evaluating the Conditions of Competition Between Imported and Domestic Line Pipe The USITC Accurately and Objectively Analyzed Import Volume and Price Declines.

130. Korea maintains that the USITC failed to demonstrate a causal relationship between increased imports and the performance of the industry.[161] Korea focuses on the analysis of both import volumes and price declines. Korea's arguments are without a legal basis, for the following reasons.

131. With respect to import volumes, Korea cites to a statement by Commissioner Crawford (the dissenting Commissioner, whose views are not part of the determination of the competent authorities) observing that domestic consumption declined so significantly in late 1998 and interim 1999 that imports

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[158] USITC Memorandum INV-W-247, table showing "U.S. Imports of carbon steel line pipe, 16 inches and under in diameter, by quarter, 1994-1999" (Exhibit USA-3).

[159] Also, if "domestic shipments already began to pick up while imports continued to decline," as Korea asserts in paragraph 271 of its submission, this would further suggest a causal link between imports and domestic shipments.

[160] Korea's First Written Submission, paras. 273-275.

[161] Korea's First Written Submission, paras. 276-283.

would have had to disappear to provide the industry with sufficient sales to avoid a decline in industry performance.[162]

132. Korea ignores the fact that it was the domestic industry and not imports that bore the brunt of the sharp decline in consumption. Imports did not disappear in late 1998 or interim 1999. As explained above, the USITC did not break 1998 statistics into smaller segments (other than for the comparison of interim periods) in its analysis. It examined whole-year data for 1998 and found that imports increased by 44.3 percent that year over 1997 levels. But even if the USITC had examined 1998 in two segments, it would have found that during the second half of 1998 imports declined to a much smaller degree than domestic consumption and the domestic industry's shipments. The indexed data shows that imports declined by 7 percent, while U.S. consumption declined by 27.2 percent, and the domestic industry's shipments fell by 35.4 percent. In other words, while consumption and the U.S. industry's production fell sharply, imports continued to flood the United States at very high levels.

133. Korea also asserts that the USITC failed to acknowledge that import levels were overstated because of dual stenciling of line pipe.[163] The USITC took note of the witness for the Korean respondents who asserted that most Korean dual-stenciled line pipe imports were actually sold for standard pipe applications. But that same witness admitted that the share sold for such applications could be substantially less, and conceded that the only way to know the actual end-use of Korean dual-stenciled line pipe would be through a sale-by-sale analysis, of which he had no evidence. Thus, there was no evidence to support Korea's assertion in its submission (para. 284) that a "substantial portion" of Korean imports were dual-stenciled but actually sold as standard pipe. On the contrary, as the USITC observed, the geographic distribution of imported Korean line pipe had shifted from the West Coast of the United States to the Gulf Coast, which is one of the largest markets for line pipe in the United States.[164]

134. Under Article 4.2(a) of the Safeguards Agreement, the United States is required "to evaluate all relevant factors *of an objective and quantifiable* nature having a bearing on the situation of that industry." (emphasis added). The Korean respondents failed to place on the record objective and quantifiable information as to the extent to which imports from Korea of dual stenciled line pipe were used in standard pipe applications. Korea fails to meet its burden of proof because it cites as facts claims that it never substantiated before the USITC.

135. Korea wrongly asserts that the USITC "performed no analysis to determine whether declines in prices were caused by imports."[165] The USITC relied on three different types of evidence in analyzing whether imports depressed domestic prices: average unit values of imports, pricing data which it collected, and questionnaire responses from a wide range of industry participants.[166]

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[162] Korea's First Written Submission, para. 276.

[163] Korea's First Written Submission, paras. 284-286.

[164] USITC Report, p. I-26.

[165] Korea's First Written Submission, para. 277. We note that an analysis of pricing is not required under Article 4 of the Safeguards Agreement.

[166] USITC Report, p. I-24-25.

136. Korea does not take issue with the evidence of price depression based on the declining average unit values of imports during 1998 and interim 1999.

137. Korea offered no evidence for its assertion that "the instances of underselling . . . did not increase over the period."[167] In any event, this assertion is irrelevant as it would not negate the evidence that imports undersold the domestic product and thus depressed prices. The USITC found that underselling was pervasive over the entire period of investigation: out of 276 instances in which quarterly prices for the imported and domestic product could be compared, imports undersold the domestic product in 226 cases, or about 82 percent of the time. The USITC also noted that, for five of the six products for which it had collected pricing data, imports from the largest import source of line pipe (Korea) undersold the domestic product in all four quarters of 1998 and the first two quarters of 1999, generally by double-digit percentages.[168]

138. Korea cites to a statement in the USITC Report that the rise and decline in oil and natural gas prices "helps explain why" line pipe prices rose and then fell.[169] As will be discussed further below, the USITC recognized that "the decline in line pipe demand resulting from reduced oil and natural gas production activities undoubtedly played a role in the industry's poor performance in 1998 and interim 1999."[170] That this development also played some role in declining line pipe prices does not detract from the evidence that imports themselves depressed domestic prices. As the Appellate Body in *United States -- Wheat Gluten* made clear, it was not necessary for the USITC to find that imports were the only cause of the decline in domestic prices.[171]

139. Korea dismisses as "anecdotal" the questionnaire responses stating that imports had significant adverse price effects. The responses were not anecdotal; rather they reflect the experience of actual market participants. The USITC asked U.S. producers to indicate which of 14 possible causes of injury were "very important," "important," "somewhat important," or "not important" as causes of injury. It also asked importers and purchasers to similarly rank 14 possible causes of price declines.

140. Most of the U.S. producers, importers and purchasers of line pipe identified import competition as a "very important" or "important" cause of injury and price declines.[172] The responses of importers and purchasers of line pipe – who would be expected to have an interest in maintaining access to low-priced imports – are especially credible. The USITC recognized this.[173]

141. Of the 15 importers who responded, four said that "import competition" was "very important" in causing price declines, and seven said it was "important." In addition, four of the 15 said that the

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[167] Korea's First Written Submission, para. 280.

[168] USITC Report, p. I-25.

[169] Korea's First Written Submission para. 279 (*quoting* USITC Report, p. II-45).

[170] USITC Report, p. I-30.

[171] *US – Wheat Gluten (AB),* para. 67.

[172] USITC Report, p. I-25 and II-66-68, Tables 40-42.

[173] USITC Report, p. I-25.

"increased levels of imports" were "very important" and six said that it was "important." Only two of the 15 importers stated that import competition and the increased level of imports were "not important" in causing price declines.[174]

142. Of 23 purchasers who responded, 16 said that "import competition" was "very important" in causing price declines, and four said it was "important." In addition, 11 of the 23 said that the increased levels of imports was "very important" and seven said that it was "important." Only nine of the 23 purchasers identified declines in oil and gas drilling activities as an important factor in explaining line pipe prices declines.[175]

143. This questionnaire response data was obtained from entities that were in the best position to observe and evaluate the effects of imports on domestic prices. These entities, the importers and purchasers of line pipe, would have been, at best, neutral, but probably opposed, to the prospect of safeguards measures. The evidence provided by these entities, which was objective and credible, cannot be dismissed as merely "anecdotal."

3. The USITC Properly Distinguished The Effects of Other Factors Under Article 4.2(b) And Properly Established The Causal Link Without Attributing To Imports Injury Caused By Other Factors.

144. Consistent with Article 4.2(b), the USITC examined six factors other than increased imports as possible other causes of serious injury. While the USITC found that one other causal factor, declining demand in the oil and gas sector, contributed to the serious injury experienced by the domestic industry, it also found that the impact of increased imports was as great or greater than the effect of the downturn in oil and gas sector demand.[176]

145. In examining these other causal factors, the USITC distinguished the injurious effects of increased imports from the effects caused by these other factors.[177] The USITC analyzed these factors in the terms of the U.S. statute, which requires that increased imports be a "substantial" cause of serious injury to the domestic industry. In turn, the U.S. statute defines "substantial cause" as "a cause which is important and not less than any other cause."[178] By examining these other factors in this manner, the USITC ensured that it did not improperly attribute to imports injurious effects, if any, caused by the other causal factors.[179] In

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[174] USITC Report, p. I-25.

[175] The USITC recognized that changes in oil and gas operations were not listed as a possible cause on the USITC questionnaire, but noted that purchasers were asked to identify "other causes" of line pipe price declines, and that one would expect that many purchasers would have done so if changes in oil and gas operations had been the overriding cause of the very sharp decline in line pipe prices in 1998-1999. USITC Report, pp. I-25 and I-26 n.163.

[176] USITC Report, p. I-22.

[177] *US – Wheat Gluten (AB),* para. 69.

[178] Trade Act, § 202(b)(1)(B).

[179] *US – Wheat Gluten (AB)* para. 78. As a threshold matter, if a factor is not causing injury to

(continued...)

so doing, the USITC established that the causal link between the increased imports and the serious injury was genuine and substantial.[180]

146. The USITC's analysis began with its examination of reduced oil and gas drilling and production activity in 1998 and interim 1999, and the consequent reduced demand for line pipe. In considering whether the decline was a more important cause of serious injury than increased imports, the USITC considered the effects of oil and gas on line pipe demand, thus distinguishing those effects from imports.[181]

147. The USITC recognized that the 1998/1999 oil and gas crisis resulted in declining demand for line pipe. However, the USITC found several reasons that much of the deterioration in the condition of the line pipe industry could not be explained by the oil and gas crisis.

148. First, the USITC observed that the domestic industry had operated at lower levels of demand in the past without experiencing the severe financial losses the industry experienced in 1998/1999. The USITC noted that the most significant difference between previous periods of lower demand and the 1998/1999 period was the much greater presence of imports in the latter period.

149. Second, the USITC explained that reduced demand because of depressed oil and gas conditions could not account for the dramatic shift in market share from domestic line pipe to imports. A decline in demand for a relatively standardized product such as line pipe would be expected to affect all sources of supply in roughly proportional amounts. But, in this case, domestic shipments declined at a much greater rate than imports.[182]

150. Third, the USITC Report observed that declines in oil and gas production activity could not explain price declines that were not concentrated in line pipe grades typically used for oil and gas "gathering" applications, but appeared to have occurred across the spectrum of line pipe products.[183]

151. Finally, the USITC Report stated that the consensus among producers, importers and purchasers responding to the USITC's questionnaires was that imports had played a major role in the decline of line pipe prices in 1998 and interim 1999. The USITC concluded that "while the decline in line pipe demand

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[179] (...continued)
the domestic industry at the same time, then the last sentence of Article 4.2(b) referencing the causal link is inapplicable, as recognized by the Appellate Body in *Wheat Gluten.* There, the Appellate Body noted that "[t]he opening clause of that sentence indicates, to us, that this sentence provides rules that *apply when* 'increased imports' and certain 'other factors' are, together, 'causing injury' to the domestic industry 'at the same time.'" *US – Wheat Gluten (AB),* para. 68. (emphasis added).

[180] *US – Wheat Gluten (AB),* para. 69.

[181] USITC Report, p. I-27-30.

[182] As explained in the USITC Report (p. I-29), the USITC did not find persuasive the arguments of respondents that this uneven effect of declining demand was due to longer lead times for imports.

[183] The USITC found that line pipe is most sensitive to changes in oil and gas prices when used for "gathering" operations (*i.e.*, the application closest to the wellhead). USITC Report, p. II-44.

resulting from reduced oil and natural gas drilling and production activities undoubtedly played a role in the industry's poor performance in 1998 and interim 1999, we find that the effect of the imports on the domestic industry was as great or greater."[184]

152. The USITC's analysis thus was consistent with Article 4.2(b) in making this finding with respect to reduced oil and gas drilling and production activities. The USITC distinguished any injurious effects caused by increased imports from the effects of declining demand due to decreased oil and gas drilling and production by finding that the decline in demand for line pipe could not explain the level of financial losses experienced by the domestic industry, the domestic producers' loss of market share, or the across–the-board price declines affecting line pipe products not used in oil and gas gathering applications. Therefore, the USITC did not improperly attribute to imports injury caused by the decline in oil and gas demand, and its findings demonstrated that the causal link between the increased imports and the serious injury was undisturbed by any contribution to injury resulting from reduced oil and gas drilling and production activities.

153. Korea's argument with respect to the effects of reduced activity in the oil and gas industry rests in large part on its assertion that there was a coincidence in trends between declining demand due to the oil and gas crisis and the deteriorating condition of the domestic industry, and that there was no coincidence in trends between imports and the condition of the domestic industry. As explained above, Korea is incorrect. Increased imports *did* coincide with the deteriorating condition of the domestic industry. Moreover, an analysis of the conditions of competition confirmed the causal link between imports and the injured condition of the domestic industry. The fact that the oil and gas crisis also coincided with the worsening condition of the domestic industry does not prove that the USITC attributed the effects of the oil and gas crisis to imports.

154. The USITC also considered competition among domestic producers but found that, since competition among domestic producers had always been a factor in the market, such competition did not explain the sudden and sharp declines in domestic prices and shipments in 1998/1999. Furthermore, the USITC noted that two firms began production of line pipe in 1998 and that industry capacity increased over the investigation period. The USITC found, however, the modest increase in domestic capacity over the period investigated was considerably less than the growth in consumption.[185] Thus, contrary to Korea's further assertion,[186] the USITC did not improperly attribute to increased imports injury caused by competition among domestic producers.

155. The USITC next examined changes in the OCTG market that led domestic line pipe producers to redirect production facilities from producing OCTG to other products. It found that the record did not show that there had been a shift from OCTG to line pipe production in such substantial quantities as to be a more important cause of serious injury. While there was some evidence of domestic producers shifting away from OCTG production to other types of pipe, it was not clear that they switched into line pipe

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[184] USITC Report, p. I-30.

[185] USITC Report, p. I-30.

[186] Korea's First Written Submission, paras. 301-306.

production. Moreover, the USITC found that the limited evidence on the record on this point suggested that any change in production was relatively small.[187]

156. The USITC also considered allegations that declines in the domestic industry's exports were a more important cause of serious injury than increased imports. Although exports fell sharply in 1998 from the abnormally high levels in 1997, this decline in exports was dwarfed by the increase in imports over the same period. The USITC found that, while the decline in exports in 1998 and interim 1999 worsened the serious injury caused by increased imports, it was not a more important cause of the injury than the imports.[188]

157. The USITC similarly examined increases in per-unit overhead and SG&A resulting from declines in overall production. It found, as discussed more fully above, that there was no basis for assertions that there had been misallocations to line pipe of increases in overhead and SG&A resulting from declining production of other pipe products. [189]

158. Finally, the USITC considered allegations that declining raw material costs had been the cause of declining line pipe prices. The USITC found that overall raw material costs were stable during 1994-1998, except for a temporary increase in 1995. There was a decline in raw material costs in interim 1999 compared with interim 1998, but this was of less than five percent, much less than the 25 percent decline in the unit value of imports over the interim periods. In sum, the decline in raw material costs in interim 1999 did not come close to explaining the price decreases in this period.[190]

159. In examining each of these other real and alleged causes of serious injury, the USITC distinguished the effects of increased imports from the effects of the other factors, thereby ensuring that the effects of these other factors were not attributed to imports. Finally, by determining that these factors were not a greater cause of serious injury than increased imports, the USITC ensured that the increased imports constituted a substantial and genuine cause of serious injury.

E. Korea Has Not Provided Any Basis For The Panel to Conclude That Chairman Bragg And Commissioner Askey's Findings Are Inconsistent With Articles 2 And 4.

1. Chairman Bragg and Commissioner Askey's Findings Regarding Threat of Serious Injury Are Based on Facts and In Conformity With Articles 2 and 4 of the Agreement On Safeguards.

160. Article 2 of the Agreement on Safeguards provides that a Member may apply a safeguard measure to a product only if that Member has determined that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the relevant domestic industry. Article 4.1(b) of the

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[187] USITC Report, pp. I-30-31.

[188] USITC Report, p. I-31.

[189] USITC Report, p. I-31.

[190] USITC Report, pp. I-31-32.

Agreement on Safeguards requires that a finding of "threat of serious injury" must be based on facts, and not conjecture, and that serious injury be clearly imminent.

161. In *Argentina - Footwear* the Appellate Body interpreted Article 2.1 to mean that the increase in imports must be recent, sudden, sharp, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause "serious injury."[191] Chairman Bragg and Commissioner Askey found threat of serious injury. In their decision, they did not rely on a threat of increase in imports, as Korea alleges, but on an actual surge in import levels between 1997 and 1998 that continued through interim 1999. This surge of imports was sudden, significant and sharp enough to satisfy the requirements of Article 2.1 that there were "*such* increased quantities" of imports as to threaten to cause serious injury.[192]

162. Chairman Bragg and Commissioner Askey joined with the Commission majority in finding that line pipe imports increased over the period of investigation, not a speculative threat of increased imports as Korea alleges. Therefore, Chairman Bragg and Commissioner Askey made the finding of increased imports that Korea implies is a sufficient basis for a threat of serious injury.[193] Korea has provided no reason for the Panel to conclude that this aspect of the determination is inconsistent with the WTO Agreement. Rather, Korea's arguments simply present another view of the facts, and improperly suggest that the Panel make its own *de novo* interpretation of the record.

163. Korea misconstrues the facts when it argues that imports "declined dramatically" over four quarters or for a full year prior to the decision.[194] As explained above, Korea crafts its own preferred definition of the appropriate period of investigation, the last six months of 1998 and the first six months of 1999, to show some decline in imports. Any difference between the levels of imports in the first and second half of 1998 does not detract from the fact that full year data showed a surge in imports between 1997 and 1998. As for the modest decline in imports in interim 1999 as compared to interim 1998, Chairman Bragg and Commissioner Askey found that the surge in imports in 1998 and the high import levels in interim 1999 outweighed any decrease.[195]

164. In arguing, contrary to a wealth of evidence, that imports were declining, Korea urges the Panel to magnify a small portion of the data and ignore the rest of it. In *Argentina - Footwear*, the Appellate Body agreed with the *Argentina Footwear* Panel that "the competent authorities are required to consider the

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[191] *Argentina - Footwear* (AB), para.131.

[192] *Argentina - Footwear* (AB), para.131.

[193] In footnote 333 to paragraph 315 of its first written submission, Korea contends that a determination of threat of serious injury cannot be based on a finding of "a mere threat of an increase in imports." If that is the case, an actual increase in imports – such as Chairman Bragg and Commissioner Askey found – must be sufficient by itself. If not, Korea's interpretation would provide no circumstance in which a finding of threat of serious injury was possible, an outcome inconsistent with the principle of effectiveness in the interpretation of treaties.

[194] Korea's First Written Submission, paras. 313-314.

[195] USITC Report, pp. I-46-47.

trends in imports over the period of investigation."[196] In this case, there was a surge in imports between 1997 and 1998 and continuing high levels of total imports in interim 1999, albeit at a somewhat lower level than in interim 1998. In *Argentina - Footwear*, the Appellate Body also found that competent authorities must consider recent imports.[197] This substantial, sudden and recent increase in imports refutes Korea's arguments that imports were declining. Chairman Bragg and Commissioner Askey considered these trends, including the differences between the interim periods, and found that they supported an affirmative threat determination. Moreover, consistent with Article 4.2, Chairman Bragg and Commissioner Askey took into consideration a jump in the U.S. market share held by imports between 1997 and 1998. They further noted that the U.S. market share held by imports was higher in interim 1999 as compared to interim 1998.[198]

165. Korea asserts that imports declined relative to increasing domestic shipments between the latter half of 1998 and the first half of 1999.[199] Once again, Korea focuses on a very small portion of the data and ignores the larger trends. Consistent with USITC practice, Chairman Bragg and Commissioner Askey focused on the comparison of the interim periods of 1998 and 1999. For the reasons discussed above, this comparison avoids the possibility that seasonal fluctuations could affect the data, and as the traditional Commission analysis, was not tailored to yield a particular result. In any event, after such a large decrease – 35.4 percent – in shipments between the first and second halves of 1998, a 5.8 percent increase in the first half of 1999 scarcely represents an upward "trend" that disturbs the Commissioners' conclusion. Korea cites to data showing that domestic producers shipped an additional 14,540 short tons in interim 1999, as compared to the second half of 1998. However, it ignores the fact that domestic producers shipped 123,087 fewer short tons in interim 1999 as compared to interim 1998.[200]

166. As discussed above, there is extensive evidence of increased imports. Korea argues that the Commissioners' findings of excess capacity among foreign producers do not constitute positive evidence that imports would increase further. The Agreement on Safeguards does not require positive evidence that imports are about to increase further to support a threat finding,[201] but a causal link between increased imports and the threat of serious injury to the domestic industry. As discussed in the following section, the Commissioners established the existence of such a causal link. Chairman Bragg and Commissioner Askey also made a supplemental finding that subject imports were likely to increase in the foreseeable future, a finding which further supported their conclusions of a threat of serious injury. Based on quantifiable and objective evidence about available capacity in foreign facilities, these Commissioners reasonably found that there was a "very real potential for increased imports from [foreign producers in Korea, Japan, United Kingdom, Venezuela and Turkey]."[202]

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[196] *Argentina-Footwear* (AB), para.129.

[197] *Argentina -Footwear* (AB), paras.130-131.

[198] USITC Report, p. I-47.

[199] Korea's First Written Submission, para. 314.

[200] USITC Report, p. I-39.

[201] *US - Lamb Meat*, para. 7.187.

[202] USITC Report, pp. I-48-49.

2. Korea Has Not Met the Burden to Prove Its Claim That Chairman Bragg and Commissioner Askey Failed to Identify a Causal Link Between Imports and the Threat of Serious Injury.

167. Korea advances strictly factual arguments against the finding by Chairman Bragg and Commissioner Askey of a causal link between increased imports and the threat of serious injury. The arguments are cursory, and do not support Korea's contention that "the positive evidence in the record directly contradicted the conclusions hypothesized [by the two Commissioners]: price declines and increasing imports."[203]

168. Korea argues that Chairman Bragg and Commissioner Askey based their findings regarding threat of serious injury solely on a threat of increasing imports, and that the evidence does not support those findings. They are incorrect on both counts. Chairman Bragg and Commissioner Askey found both that the increase in imports that had already occurred was an important cause no less than any other cause of the threat of serious injury to the domestic line pipe industry, and that subject imports were likely to increase in the future.[204] Both of these findings are supported by the evidence. These Commissioners supported their findings regarding likely increased imports in the future with the evidence regarding available capacity in foreign facilities discussed above. The Agreement on Safeguards does not require that the competent authorities make findings regarding prices. However, Chairman Bragg and Commissioner Askey found that increased imports contributed to the decline in U.S. producers' prices for line pipe.[205] These Commissioners found that these line pipe prices were at their lowest levels in the second quarter of 1999, based on ample evidence in the record.[206]

169. Korea argues that the evidence does not support Chairman Bragg and Commissioner Askey's findings that future increased imports would cause further declines in U.S. prices, because evidence in the record showed that prices were increasing, rather than decreasing. Korea is incorrect on both counts and improperly urges the Panel to conduct a *de novo* review of the facts. First, as stated above, the record clearly shows that U.S. line pipe prices were at their lowest levels in the second quarter of 1999.[207] Thus, Korea's assertions that the evidence contradicts the Commissioners' findings regarding price declines are not supported by the facts. Second, neither of Korea's sources for its arguments that prices were increasing and instances of underselling were declining, supports its assertions.[208] Chairman Bragg and

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[203] Korea's First Written Submission, para. 317.

[204] USITC Report, p. I-48.

[205] USITC Report, p. I-46.

[206] USITC Report, p. I-43. Tables 27 to 30 show lower prices for different U.S. line pipe products in the second quarter of 1999 than in any other period. USITC Report, pp. II-56-62.

[207] USITC Report, p. I-43. Tables 27 to 30.

[208] Korea relies on statements in Commissioner Crawford's dissenting views and arguments in its own producers' Posthearing Injury Brief. Commissioner Crawford stated that underselling was "widespread," and that it was no worse in 1998 and 1999 than in previous periods, not that the number of instances of underselling was declining. She stated that two of the foreign producers "tended" to sell line pipe at prices higher than the domestic industry's prices in 1998 and 1999, but counterbalanced that

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Commissioner Askey found that out of a total of 276 quarterly pricing comparisons between domestic and imported products during the period of investigation, there were 226 instances of underselling.[209]

170. Chairman Bragg and Commissioner Askey's findings regarding the injurious effects of the existing increased imports and present and projected price declines caused by the imports are supported by the facts. Noting the relatively high substitutability between imported line pipe and the domestic product, as well as the importance of maximizing production in a capital-intensive industry to recover fixed costs, Chairman Bragg and Commissioner Askey concluded that domestic line pipe producers were constrained to lower prices in response to the availability of lower-priced imports to maintain or limit the loss of market share. They found that domestic prices for line pipe had declined to the point where the domestic industry was clearly threatened with serious injury, and if the low pricing was sustained, would quickly result in serious injury.[210] These conclusions are supported by the record evidence. The two Commissioners made appropriate findings regarding threat of serious injury based on facts and not mere allegation, conjecture or remote possibility.

F. Korea Has Not Established Any Basis For The Panel To Conclude That The Safeguard Measure Applied By The United States Was Inconsistent With the Safeguards Agreement Or GATT 1994.

1. Korea Has Not Met Its Burden To Establish That The Line Pipe Safeguard Was Applied Beyond The Extent Necessary To Prevent Or Remedy Serious Injury And To Facilitate Adjustment.

171. The safeguard applied by the United States took the form of a three-year supplemental duty of 19 percent. The measure exempted the first 9000 tons imported from each country, the amount necessary to ensure the exclusion of all developing country Members that account for less than three percent of total imports.[211] The President chose this measure after considering the findings and conclusions of the USITC, including the remedy recommendations. However, the measure applied differed from the recommendations in many ways. The President subtracted a year from the four-year duration recommended by the USITC, and changed the measure from a TRQ to a duty with exemptions. The duty rate was also substantially lower – 11 percentage points less than the recommended 30 percent out-of-

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[208] (...continued)
statement with the fact that at the same time "Korean suppliers continued to undersell U.S. producers by varying degrees." USITC Report, p. I-72. These statements do not support Korea's characterization that overall instances of underselling were decreasing. Any mixed under and overselling by two of the foreign producers does not negate the evidence that imports undersold the domestic product and thus depressed prices.

The Korean producers argued that the margins of underselling narrowed in 1998 and 1999, not that the number of instances of underselling fell. *Korea-Japan Posthearing Injury Brief*, pp. 59-64 (KOR-25). Neither source states that prices increased.

[209] USITC Report, p. I-47.

[210] USITC Report, pp. I-47-48.

[211] Presidential Memorandum, 65 F.R. 19197.

quota duty, which the USITC concluded "will likely discourage over-quota imports, [but] it will not prohibit them from entering should domestic demand for line pipe rise sharply enough."[212]

172. Korea has failed to meet its burden of producing evidence and argumentation to support its claim that the measure violates Article 5.1, first sentence. That provision obliges a Member to "apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment." The Appellate Body has concluded that Article 5.1, first sentence

> imposes an *obligation* on a Member applying a safeguard measure to ensure that the measure applied is commensurate with the goals of preventing or remedying serious injury and of facilitating adjustment. . . . Whether it takes the form of a quantitative restriction, a tariff or a tariff rate quota, the measure in question must be applied "only to the extent necessary" to achieve the goals set forth in the first sentence of Article 5.1.[213]

Thus, the relevant inquiry under Article 5.1, first sentence, involves a comparison of the safeguard measure with the serious injury to the domestic industry and the need for adjustment. As the complainant, Korea bears the burden of demonstrating that the U.S. measure went beyond the extent necessary or, stated differently, was not "commensurate" with the goals of Article 5.1 – to remedy serious injury and facilitate adjustment.

173. Korea simply presents no evidence or argumentation responsive to this requirement. Instead, it compares the U.S. safeguard measure, as applied, with the *USITC recommendation*. It then argues that several aspects of the U.S. safeguard are more restrictive of imports or provide greater benefits to the domestic industry than the USITC recommended measure. Korea cites each of these aspects as evidence that the U.S. safeguard exceeds the Article 5.1 obligation to apply a measure only to the extent necessary. Such a comparison may reveal whether the actual measure was likely to have a greater effect on the domestic industry's prices or volume of sales than the recommended measure. But it does not indicate whether one, both, or neither of the measures is commensurate with the objectives of Article 5.1.

174. Korea also fails to evaluate the measure as a whole. Instead, it focuses on the volume component of the U.S. safeguard in isolation. For example, it argues that the U.S. safeguard must be more restrictive than necessary because it allegedly reduces the level of imports to a point lower than the 151,124 ton level that the USITC found would "allow significant participation by imports in the U.S. market."[214] However, volume coverage is merely one of several potential components of a safeguard measure, including the form, duration, product definition, and amount of supplemental duties. Article 5.1 requires that the *measure*, and not each of the components, be applied only to the extent necessary to remedy serious injury and facilitate adjustment. Therefore, isolated conclusions about the effect that one component – such as the volume of imports – has on serious injury and adjustment do not satisfy Korea's burden of proof. The

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[212] USITC Report, p. I-81.

[213] *Korea – Dairy (AB)*, para. 96.

[214] Korea's First Written Submission, paras. 161. Korea makes similar arguments in paragraphs 163 and 164.

other components are likely to add or subtract from that effect, so that the application of the measure as a whole can have a different impact on serious injury and adjustment.[215]

175. Korea also fails to meet its burden of producing valid evidence to support the facts that it alleges. Korea claims that, because the USITC expected a 30 percent duty to "discourage" over-quota imports, the 19 percent global duty under the Presidential safeguard would have "a similar effect."[216] The argument is illogical – one would expect a lower duty to have a *lesser* effect. In fact, the USITC concluded that even the 30 percent duty would not prohibit imports if demand rose sharply, and that a duty at relatively low levels "would not be sufficiently restrictive to prevent imports . . . from continuing to cause the serious injury."[217] The USITC Report shows that Korean line pipe sold for as much as 32.7 percent less than comparable U.S. products,[218] suggesting that Korean imports could still be sold with a 19 percent duty. Moreover, the domestic industry admitted that demand for line pipe was growing.[219] Thus, the 19 percent duty was not likely to have an effect similar to the 30 percent duty recommended by the USITC.[220]

176. Korea also cites the import volume after application of the line pipe safeguard as evidence that the U.S. measure restricts imports more than the USITC recommendation.[221] This information is irrelevant to the question at hand and inadmissible in this proceeding because it reflects conditions *after* the U.S. decision.[222]

177. Korea's arguments on the extent of the line pipe safeguard are further undermined by the fact that the measure lasts for three years rather than the four recommended by the USITC. This difference plainly represents a substantial decrease in the extent of the measure.

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[215] For example, consider two theoretical revisions to the USITC recommended TRQ – one cutting the quota to 70,000 tons and the second cutting the quota to 70,000 tons while lowering the out-of-quota tariff to 5 percent. The effect of the first measure on serious injury and adjustment would likely be greater than the USITC TRQ, while the effect of the second measure would be less.

[216] Korea's First Written Submission, para. 162.

[217] USITC Report, p. I-81.

[218] USITC Report, p. II-65, Table 39. The USITC also found that imported line pipe was comparable to U.S. line pipe in most respects. USITC, Report p. I-23 and n. 140.

[219] USITC Report, pp. I-76 - I-77.

[220] The average unit value of domestic line pipe (essentially the average price) fell from $509.70 in interim 1998 to $412.85 per short ton in interim 1999 – exactly 19 percent. USITC Report, p. II-23, Table 6. The same comparison of average unit values for imports shows a reduction of 23.8 percent. Thus, a 19 percent duty would act to restore the *status quo* rather than preclude sales by any particular supplier.

[221] Korea's First Written Submission, para. 164.

[222] *See* Section IV.B, below.

178. Korea also asserts as a general matter that the United States did not base the line pipe safeguard on economic analysis.[223] This is incorrect. As Korea admits, the USITC Report, which formed the basis for the safeguard measure, contained extensive economic analysis.[224] There was, therefore, no need for the President to reevaluate this evidence or analysis in Proclamation 7274 or the supporting materials. Indeed, the Appellate Body in *Korea – Dairy*:

> reverse[d] the Panel's broad finding . . . that Article 5.1 requires a Member to explain, at the time it makes its recommendations and determinations concerning the application of a safeguard measure, that its measure is necessary to remedy serious injury and to facilitate adjustment.[225]

Therefore, the absence of an "economic analysis" by the President in support of the line pipe safeguard cannot constitute an inconsistency with the WTO Agreement, or evidence that the President failed to consider any issue. In any event, the Safeguards Agreement contains no requirement for a Member to use "economic analysis" to determine the level of a safeguard measure.

179. Finally, Korea claims that the U.S. measure failed to account for growing demand because it did not provide for a progressive increase in the quantity of imports exempted from the supplemental duty. Article 7.4 sets forth a Member's obligation to progressively liberalize a safeguard measure. It is silent on how to liberalize, or the extent to liberalize in any given year. The United States satisfied this requirement by providing for annual reductions in the supplemental duty. There is no requirement that it take the additional step of increasing the quantity of imports exempted from the duty.

180. Thus, Korea has presented neither factual evidence nor argumentation establishing that the United States applied its safeguard beyond the extent necessary to remedy serious injury and facilitate adjustment. Therefore, the Panel should reject the claim of inconsistency with Article 5.1, first sentence.

2. Korea Has Not Met Its Burden of Showing that Article 5.1, Second Sentence, Article 5.2(a), or Article XIII are Applicable to the Type of Safeguard Imposed on Line Pipe.

181. The United States and Korea disagree on whether to characterize the line pipe safeguard as a supplemental duty with exemptions or a TRQ. However, this disagreement is largely irrelevant because neither Article 5.1, second sentence, nor Article XIII apply to either type of measure. The relevant language in Article 5.1, second sentence, and Article 5.2(a) applies only to quantitative restrictions or quotas. As we show below, neither a supplemental duty (the U.S. characterization of the measure) nor a TRQ is a quantitative restriction or quota within the meaning of GATT 1994. Article XIII simply does not apply to safeguard measures. The Safeguards Agreement is a "comprehensive agreement" on the terms for applying an Article XIX safeguard measure. There is no basis in the WTO Agreement to apply restrictions on the nature of a safeguard measure beyond those already specified in the Safeguards Agreement and Article XIX.

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[223] Korea's First Written Submission, para. 160.

[224] *Ibid.*

[225] *Korea – Dairy (AB)*, para. 103.

182. Moreover, additional restrictions are unnecessary. The Safeguards Agreement already places limitations on the process for determining serious injury and on the duration and extent of a safeguard measure.

183. Korea has failed to demonstrate that the line pipe safeguard is a TRQ and, as such, is bound by the disciplines on quantitative restrictions under Article 5.1 and Article XIII. First, the facts do not support Korea's conclusion that the line pipe safeguard – a global tariff with a 9000 ton exemption for each supplying country – is in reality a TRQ. Second, as a matter of law, TRQs are not quantitative restrictions.[226] Therefore, they need not conform to the Article 5.1 rules on safeguard measures in the form of quantitative restrictions. Third, Article XIII does not apply independently to safeguard measures, since Articles 5, 7, 8 and 12 provide a comprehensive system for determining the form, extent, and notice requirements for a safeguard measure that intentionally incorporates some elements of Article XIII and excludes others.

a. The Line Pipe Safeguard Is Not A Tariff Rate Quota.

184. Under the line pipe safeguard, the United States imposed a 19 percent supplemental duty on all imports of line pipe. It then exempted the first 9000 tons imported from each country source. In contrast, a TRQ, such as the USITC recommended remedy, places a limit on the volume of imports subject to the lower tariff. Under the line pipe safeguard, the only limit on the volume of imports free from the 19 percent supplemental duty is the number of WTO Members who choose to take advantage of the 9000 ton exemption.[227] Thus, the line pipe safeguard does not create a TRQ.

185. Korea has failed to offer any effective reasoning or support for its assertion that the line pipe safeguard is a TRQ. It merely asserts a "plain meaning" for the term TRQ (without providing any citation) and then asserts that the line pipe safeguard falls within this definition because it provides a volume-limited exemption from the supplemental duty.[228] However, the ordinary meaning of "tariff quota" (also known as a "tariff rate quota") – "[a]pplication of a higher tariff rate to imported goods after a specified quantity of the item has entered the country at a lower prevailing rate" – does not support Korea's claim.[229] Since there is no overall limit on eligibility, the measure is not a TRQ.

186. It is also important to note that the structure of the line pipe safeguard is actually an advantage for exporters. The United States is prepared to demonstrate that the 19 percent duty, without the 9000 ton duty exemption, would also have satisfied the requirements of Safeguards Agreement, and in particular

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[226] *See* Section III.F.2.b, below.

[227] Nineteen countries exported at least 100 tons of line pipe to the United States during the period covered by the USITC investigation. *See* USITC Memorandum EC-W-071, p. 15, Table 2 (Exhibit USA-5). If all took advantage of the exemption, 171,000 tons of line pipe could be imported into the United States without paying the supplemental duty.

[228] Korea's First Written Submission, paras. 120-121.

[229] Dictionary of International Trade Terms, p. 157 (William S. Hein & Co., Inc. 1996) (Exhibit USA-6). *See also European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 by Ecuador*, para. 6.20 ("by definition, a tariff quota is a quantitative limit on the availability of a specific tariff rate.").

Article 5.1. Thus, the exemption placed Korea and other exporters in a *better* position than they might otherwise have occupied.

187. But more importantly, the label placed on the measure has no bearing on the outcome of this dispute. Korea has failed to provide any legal basis to conclude that the measure – whether treated as a supplemental duty with exemptions or a TRQ – is inconsistent with Article 5 or Article XIII. Therefore, it has failed to meet its burden of proof.

b. The Article 5 Rules for Safeguard Quantitative Restrictions and Quotas Do Not Apply Because the Line Pipe Safeguard Is Not a Quantitative Restriction.

188. Article 5 places restrictions on a Member's ability to apply a quantitative restriction or quota as a safeguard measure. These restrictions do not apply to the line pipe safeguard for the simple reason that it is neither a quantitative restriction nor a quota.

189. Article 5 affects a Member's ability to use a quantitative restriction as a safeguard measure in three ways:

- Under Article 5.1, second sentence, "any quantitative restriction shall not reduce the quantity of imports below the level of a recent period which shall be the average of imports in the last three representative years for which statistics are available" unless the Member provides "clear justification."

- Under Article 5.2(a), any allocation of a quota must either be endorsed by the supplying countries or must be based on the proportion of imports supplied during a previous representative period by each Member with a substantial interest in supplying the product.

- Under Article 5.2(b), a Member may depart from the requirements of Article 5.2(a) in certain limited circumstances.

190. On their face, these obligations apply only to measures in the form of a quantitative restriction or quota. This is obviously not the case if the line pipe safeguard is recognized as a supplemental duty. Duties are by their nature not "quantitative restrictions." The text of Article XI:1 demonstrates this point by explicitly excluding "duties, taxes or other charges" from the "prohibitions or restrictions" that fall subject to its ban on "quantitative restrictions."

191. Korea instead argues that the line pipe safeguard is a TRQ, and that a TRQ is a quantitative restriction. The only basis it provides is the unsupported assertion that "[t]he plain meaning of a tariff-rate quota is that it consists of two elements: a quota and a tariff." However, the language of the WTO Agreements, practice under GATT 1947, and the interpretations of past panels establish that a TRQ is not a quantitative restriction.

192. In deciding that TRQs were not subject to the GATT 1947 Article XI ban on quantitative restrictions, the panel in *EEC – Import Regime for Bananas* (*"Bananas II"*) adopted reasoning that reveals the flaws with Korea's conclusion:

> The Panel noted in this respect that the schedules of concessions of many contracting parties provided for tariff quotas and that the CONTRACTING PARTIES had never found tariff quotas, as such, to be "restrictions" within the meaning of Article XI:1. This accords with the distinction in Article XIII between "prohibition or restriction" (paragraph 1) and "any tariff quota", which is referred to specifically in paragraph 5. For these reasons, the Panel found that the EEC measures permitting the import of bananas under one tariff rate up to a specified amount, and any additional amount at a higher tariff rate, were, as such, not inconsistent with Article XI:1.[230]

193. As the *Bananas II* panel noted, the text of Article XIII is especially telling. It bears the title "Non-discriminatory Administration of Quantitative Restrictions." Paragraph 1 states that "[n]o prohibition or restriction shall be applied" on imports unless "importations of the like product of all third countries . . . is similarly prohibited or restricted." The parallel references to "restrictions" in both the title and the first paragraph indicate that they cover the same thing – that the first paragraph defines a quantitative restriction. The second paragraph of the Article places a number of restrictions on the use of quotas. The fifth paragraph states that "[t]he provisions of this Article shall apply to any tariff quota instituted or maintained by any contracting party . . ." If TRQs were by their very nature "quantitative restrictions" or "quotas," the tariff quota language in Article XIII would be superfluous. Under the principle of effectiveness, an interpretation that would render a word or clause of a treaty meaningless should be avoided.[231] Therefore, Korea's view that TRQs are by nature quantitative restrictions cannot be correct.

194. Other sources confirm this conclusion. The panel in *Bananas III* stated that "[i]n this case, we are concerned with tariff quotas, which are permitted under GATT rules, and not quantitative restrictions *per se*."[232] Thus, the panel reached the same conclusion under GATT 1994 that the *Bananas II* panel reached for GATT 1947 – that TRQs are not a form of quantitative restriction prohibited under Article XI and, accordingly, are not a *per se* quantitative restriction. The Appellate Body stated in *Korea – Dairy* that a safeguard measure may "take[] the form of a quantitative restriction, a tariff or a tariff rate quota."[233] This passage indicates that the Appellate Body, too, sees TRQs as falling outside the category of a quantitative restrictions.

195. The text of GATT 1947, interpretations of that text by panels, and the practice of the CONTRACTING PARTIES to GATT 1947 confirm that a TRQ is neither a quota nor a quantitative restriction. Therefore, the line pipe safeguard, whether a tariff measure or a TRQ, is not subject to the limitations on quantitative restrictions and quotas imposed by Articles 5.1, second sentence, 5.2(a), and 5.2(b).

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[230] *EEC – Import Regime for Bananas*, DS38/R (11 February 1994).

[231] *Argentina – Footwear (AB)*, para. 88, n. 76 ("An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.").

[232] *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/USA, para. 7.68 (22 May 1997).

[233] *Korea – Dairy (AB)*, para. 96. Under GATT 1947, the CONTRACTING PARTIES characterized TRQs imposed pursuant to Article XIX as a subset of "tariff-type measure," rather than quantitative restrictions. Modalities of Application of Article XIX, L/4679, paras. 37-39 (5 July 1978).

c. Article XIII Does Not Apply to a Safeguard Measure Imposed Pursuant to the Safeguards Agreement and Article XIX.

196. Korea argues that, in addition to meeting the requirements of the Safeguards Agreement and Article XIX, a Member imposing a TRQ safeguard must meet additional requirements created by Article XIII. This view disregards the most fundamental rule of treaty interpretation – to examine "the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[234] The object and purpose of the Safeguards Agreement is to "clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX" by creating "a comprehensive agreement, applicable to all Members and based on the basic principles of GATT 1994."[235] One vital aspect of this clarification was the integration of Article XIII principles into the comprehensive framework of the Safeguards Agreement, with some strengthened, some remaining the same, and some removed. Any interpretation, like Korea's, that seeks to apply Article XIII independently to safeguard measures does violence to the stated object and purpose of the Safeguards Agreement. Moreover, it disturbs the balance of rights and obligations that, in this case, allows the line pipe safeguard to achieve the objectives of remedying serious injury and facilitating adjustment.

197. A panel found that, under GATT 1947, Article XIII did apply to measures applied under Article XIX.[236] However, it is well established that "the GATT 1994 is *not* the GATT 1947. It is 'legally distinct' from the GATT 1947."[237] The addition of the Safeguards Agreement to the GATT text under the WTO Agreement broke any link that may have existed between Articles XIII and XIX under GATT 1947.

198. The preamble of the Safeguards Agreement sets forth two objectives relevant to an analysis of the relationship between Article XIII and the Safeguards Agreement under the WTO Agreement:

> *Recognizing* the need to clarify and reinforce the disciplines of GATT 1994, and specifically those of its Article XIX, . . . to re-establish multilateral control over safeguards and eliminate measures that escape such control; . . .
>
> *Recognizing* further that, for these purposes, a comprehensive agreement, applicable to all Members and based on the basic principles of GATT 1994, is called for.

199. The Safeguards Agreement achieves these goals by adopting the basic principles of GATT 1994 and expanding on the requirements for imposition of a safeguard measure under Article XIX. In the latter category, it defines key safeguard terms in Article 4.1, identifies factors to consider in a serious injury investigation in Article 4.2, and sets procedural requirements for the investigation in Article 3. Article 5.1, first sentence, precludes safeguard measures from being applied beyond the extent necessary to remedy serious injury and facilitate adjustment.

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[234] Vienna Convention, Art. 31.1; *Argentina – Footwear (AB)*, para. 91.

[235] Safeguards Agreement, preamble.

[236] *Norway – Restrictions on Imports of Certain Textile Products*, adopted on 18 June 1980, L/4959 - BISD 27S/119, para. 14(a).

[237] *Argentina – Footwear (AB)*, para. 81 (emphasis in original).

200. In the realm of basic principles, Article 2.2 imposes a nondiscrimination requirement on safeguard measures. The Safeguards Agreement also adopts several of the basic requirements of GATT Article XIII. Paragraphs 1 and 2 of Article 12 impose notice requirements similar to, but more rigorous than those under Article XIII:3(b) and 3(c). Articles 8 and 12.3, like paragraph 4 of Article XIII, contains consultation requirements. Article 5.2(a) is identical to paragraph 2(d) of Article XIII, which governs allocation of quotas among supplying countries.

201. In several instances, the Safeguards Agreement adopts rules more stringent than those under Article XIII. Article 5.1, first sentence, requires that the application of any measure (not just a quota) be no more restrictive than necessary to remedy serious injury and facilitate adjustment. Article 5.2, second sentence, places much stricter limits on the determination of the amount of an absolute quota than does Article XIII. Article 5.2(b) creates an exception to quota allocation rules entirely absent from Article XIII. And, as noted above, the Safeguards Agreement does not adopt the Article XIII provision subjecting TRQs to the rules governing quantitative restrictions.

202. Korea argues that the Article XIII requirements not incorporated into the Safeguards Agreement nevertheless apply to safeguard measures. As support for this proposition, it cites:

- The statement in Article II:2 of the Marrakesh Agreement that all of the Multilateral Trade Agreements in Annexes 1, 2 and 3 "are integral parts of this Agreement, binding on all members'"
- The Appellate Body finding in *Argentina – Footwear* that "Article XIX of GATT and the Agreement on Safeguards must *a fortiori* be read as representing an *inseparable package* of rights and disciplines," as they are both provisions of one treaty; and
- The finding in *Argentina – Footwear* that "a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously."[238]

203. Korea fails to appreciate that these principles show the fallacy of its interpretation. If the panel is to treat Article XIII and the Safeguards Agreement as integral parts of one agreement, it must respect the relationship that the WTO Agreement establishes between them.

204. The text of the WTO Agreement delineates precisely the relationship between the Safeguards Agreement and the other multilateral trade agreements. Most importantly, as the Appellate Body recognized in *Argentina – Footwear*, Article XIX and the Safeguards Agreement form an "inseparable package of rights and disciplines."[239] It based this conclusion on the fact they "relate to the same thing, namely the application by Members of safeguard measures." The Appellate Body also noted the Safeguards Agreement's numerous references to Article XIX. Article 1 states that the agreement applies to the "measures" provided under Article XIX. Under Article 11.1(a), a safeguard measure must "conform[] with the provisions of that Article applied in accordance with this Agreement."[240] We note in

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[238] Korea's First Written Submission, p. 33, n. 134.

[239] *Argentina – Footwear (AB)*, para. 81.

[240] *Argentina – Footwear (AB)*, paras. 88-89.

addition the provision under Article 11.1(c) that the Safeguards Agreement applies only to measures under Article XIX, and not those under any other provision of the WTO Agreement.

205. None of these observations holds true for Article XIII, establishing that it is not part of the "inseparable package of rights and disciplines" that regulate application of a an Article XIX safeguard measure.

206. A consideration of the particular Article XIII obligations that Korea believes are applicable to the line pipe safeguard shows the errors in its reasoning. For example, Korea argues that the line pipe safeguard did not comply with the Article XIII:2(d) obligations regarding allocation of quotas among exporting countries.[241] That provision is identical to Article 5.2(a). Thus, if Article XIII:2(d) applied independently to a safeguard measure, the inclusion of the same language in Article 5.2(a) becomes superfluous, which would violate the principle of effectiveness in interpretation of treaties.[242]

207. In addition, under the Safeguards Agreement, Article 5.2(b) authorizes deviation from the Article 5.2(a) requirement to base quota allocations on a previous representative period. If Article XIII:2(d) created an independent obligation with regard to Safeguards Agreements, it would not be subject to the exception created by Article 5.2(b), creating a conflict between the Safeguards Agreement and GATT 1994. Thus, the public international law presumption against conflicts militates against an interpretation that applies Article XIII:2(d) to safeguard measures.[243]

208. Korea also contends that the line pipe safeguard is inconsistent with the "general overarching requirement" in the chapeau of Article XIII:2 that "[c]ontracting parties shall aim at a distribution of trade in such products approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions."[244] However, the word-for-word incorporation of Article XIII:2(d) into the Safeguards Agreement suggests that the drafters purposely omitted the chapeau.[245]

209. Korea argues that the line pipe safeguard violated both the Article XIII:2(a) obligation that "wherever practicable," total TRQ amounts shall be "fixed," and the Article XIII:3(b) obligation to notify WTO Members of the amount and allocations of any quota. Again, that the Safeguards Agreement simultaneously omits this provision and incorporates other provisions of Article XIII suggests strongly that the omission was intentional.

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[241] Korea's First Written Submission, para. 128.

[242] *See* note 231, *supra*.

[243] *United States – Section 110(5)*, WT/DS160/R, para. 6.66; *accord Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, para. 14.28.

[244] Korea's First Written Submission, para. 124.

[245] As the Appellate Body has noted, a treaty interpreter must "read and interpret the words actually used by the agreement under examination, and not words which the interpreter may feel should have been used." *EC – Hormones (AB)*, para. 181

210. The structure of the Safeguards Agreement indicates the reason for omitting those provisions. The obligations in Article XIII:2(a) and XIII:3(b) are redundant of the obligation under Article 12.1 and 12.2 to provide notification to the Committee on Safeguards of a proposed safeguard measure. There is no question that the United States provided such notifications, and Korea admits that it received an informal notification well before imposition of the measure.[246]

211. In any event, Korea's own arguments establish why it was not "practicable" for the United States to fix the overall quantity of imports eligible for the exemption from the 19 percent supplemental duty. With every Member subject to the exemption, and an indeterminate number of countries capable of exporting line pipe to the United States, there was no way to determine the total volume eligible for exemption. Thus, Korea has failed to meet its burden to prove that the facts establish a violation of Article XIII:2(a), without which there can be no derivative obligation to notify the quota level under Article XIII:3(b).

212. In sum, the Safeguards Agreement creates a "comprehensive agreement" regulating the application of safeguard measures. The explicit references to Article XIX make its provisions part of the Safeguards Agreement, forming an "inseparable package of rights and obligations." That package contains procedural requirements, a nondiscrimination obligation, and a variety of limitations on the application of safeguard restrictions, including provisions that duplicate some of the requirements of Article XIII. Therefore, as a legal matter, the WTO Agreement cannot be interpreted to apply the omitted provisions of Article XIII to measures authorized under the Safeguards Agreement.

213. Finally, we note that this interpretation also makes sense as a matter of policy. Under the Safeguards Agreement and Article XIX, Members may take emergency action when an increase in imports results in serious injury to a domestic industry. The drafters of the Agreement circumscribed this right by forbidding application of a measure beyond the extent necessary to remedy serious injury and facilitate adjustment, and exhorted Members to "choose measures most suitable for the achievement of these objectives." They imposed additional restrictions on the duration of the measure and the use of quotas. To import additional restrictions into the Safeguards Agreement – such as the Article XIII restrictions on TRQs – is unnecessary and would limit Members' ability to achieve the objectives of the Agreement.

3. Articles I and XIII:1 and Article 2 Do Not Prohibit A Member From Excluding Its Free Trade Agreement Partners From A Safeguard Measure.

214. Korea notes that Articles I and XIII:1 and Article 2 embody the MFN principle of the WTO, and posits that this principle prevents the exclusion of any Member from a safeguard measure. We do not question that the MFN obligation is important to the WTO Agreement. However, Article XXIV creates an exception to this principle for Members of a free trade agreement. Footnote 1 of the Safeguards Agreement establishes that no provision of the Safeguards Agreement will nullify the effect of Article XXIV on the interpretation of Article XIX. Therefore, Articles I and XIII:1 and Article 2 do not prohibit the United States from excluding Canada and Mexico, its partners in the North American Free Trade Agreement ("NAFTA"), from a safeguard measure.

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[246] Korea's First Written Submission, para. 324.

215. The text of GATT 1994 is clear on this point. Article XXIV:4 recognizes "the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration" among countries consistent with the objective of facilitating trade while not raising barriers to trade with other Members. To this end, Article XXIV:5 provides that "the provisions of this Agreement shall not prevent" the formation of a free-trade area, provided that certain conditions are met.

216. Article XXIV:8(b) defines a free trade area as:

> a group of two or more customs territories in which the duties and other restrictive regulations of commerce (except, where necessary, those permitted under Articles XI, XII, XIII, XIV, XV and XX) are eliminated on substantially all the trade between the constituent territories in products originating in such territories.

It is noteworthy that the list of measures that Article XXIV:8 specifically authorizes FTA parties to maintain against each other does not include safeguards measures applied under Article XIX. By implication then, safeguard measures either may or must be made part of the general elimination of "restrictive regulations of commerce" under any FTA.

217. We demonstrated in the preceding section that Article XIII does not apply to safeguard measures. However, to the extent that Articles I, XIII, or XIX can be interpreted to contemplate the application of safeguard measures to products from all sources, Article XXIV creates a limited exception. This is because under the express terms of Article XXIV:5, no other provision of the GATT 1994, including Article XIX, can be read to prevent participants in an FTA from carrying out their mutual commitments to exempt each other's trade from trade restrictive measures, including safeguard measures.

218. NAFTA qualifies for this exception. There is no dispute that NAFTA is an FTA within the meaning of Article XXIV:8, duly notified to the GATT, and that it calls for the parties to exclude each other's goods from Article XIX safeguard measures under certain conditions.[247] Nor is there any dispute that, in excluding Mexican and Canadian line pipe from its safeguard measure, the United States acted in compliance with NAFTA. The safeguard exclusion was part of NAFTA at the time of its entry into force. Prior to that time, a similar provision applied solely between the United States and Canada pursuant to the United States - Canada Free-Trade Agreement.[248]

219. Nor has Korea disputed that the safeguard exclusion is an integral component of the elimination of trade restrictive measures incorporated in NAFTA. Therefore, the exclusion is part of the general elimination of restrictive regulations of trade under an FTA, and falls within the purview of Article XXIV. By virtue of Article XXIV:5, application by the United States of the safeguards exclusion is not foreclosed either by the requirements of Articles I, XIII, or XIX.

220. Article 2.2 also creates a nondiscrimination requirement. However, this requirement does not supersede the Article XXIV authorization for Members to exclude free trade agreement partners from safeguard measures. The last sentence of footnote 1 states that "[n]othing in this Agreement prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994."

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[247] *See* North American Free Trade Agreement, Article 802.

[248] U.S.-Canada Free Trade Agreement, Art. 1102. The Agreement entered into force in 1988.

Thus, issues related to FTA imports are to be addressed exclusively under the relevant GATT 1994 articles.

221. Application of the customary rules of treaty interpretation supports this conclusion. Under Article 31 of the Vienna Convention, the words in footnote 1 must be interpreted in good faith in accordance with their ordinary meaning in their context and in the light of the object and purpose of the Safeguards Agreement. The ordinary meaning of the first four words of the footnote, "nothing in this Agreement," is to place a limitation on the entire agreement by indicating something that it does not do. The end of the sentence indicates what is being limited – "the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994."

222. As noted above, Article XIX authorizes the imposition of safeguard measures subject to certain conditions. Article XXIV:8(b) defines a free trade agreement in terms of the restrictive regulations on trade that it must eliminate, and those that it may retain.[249] Therefore, the "relationship" between Articles XIX and XXIV:8 addresses the application of safeguard measures in the context of an FTA that may prohibit or limit safeguard measures as one way to eliminate duties and other restrictive regulation of commerce.

223. The verb, "prejudge," establishes the nature of the limitation. The ordinary meaning of the word is to "[a]ffect adversely or unjustly; prejudice, harm, injure," and to "[p]ass judgment or pronounce sentence on before trial without proper inquiry."[250]

224. These separate elements of footnote 1, last sentence, combine to establish that nothing in the Safeguards Agreement shall affect the interpretation of the extent to which the Members of an FTA may exclude trade among themselves from the application of Article XIX safeguard measures. In other words, the footnote means that the provisions of the Safeguards Agreement are not intended to disturb the relationship between the GATT 1994 rules addressing safeguard measures on the one hand and the rights and obligations of the participants in an FTA on the other.

225. The footnote signals that the framers of the Safeguards Agreement intended to avoid disturbing the *status quo ante* with regard to these issues, leaving them to be resolved exclusively under the GATT 1994 provisions as they stood prior to 1995. As we have shown above, those provisions permit the exclusion of free trade agreement partners from safeguard measures.

226. Korea complains that such exclusions discriminate against it because the safeguard measure has made Korean line pipe less competitive with imports from Canada and Mexico in the United States. However, in this regard, the line pipe safeguard operates no differently from any other duty rate that the United States maintains in conformity with the WTO Agreement. NAFTA trading partners receive an advantage as a result of their agreement to remove restrictions from substantially all trade with the United States. Indeed, it would be quite odd to interpret Article XXIV as requiring the complete elimination of such restrictions and Articles I or XIII:1 as requiring the application of safeguard measures.

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[249] Article XXIV:8(a) defines a customs union and, therefore, is not relevant to this inquiry.

[250] The New Shorter Oxford English Dictionary, pp. 2332-2333.

4. The 9000 Ton Exemption From the Supplemental Duty Satisfied The Requirements of Article 9.1 To Exclude Developing Country Members From Application of Safeguard Measures.

227. Korea charges that the United States violated Article 9.1 because it "treated developing countries, regardless of their prior import levels, as equal to all suppliers, and assigned them each a quota of 9,000 short tons."[251] Article 9.1 states that

> [s]afeguard measures shall not be applied against a product originating in a developing country Member as long as its share of imports in the product concerned in the importing Member does not exceed 3 per cent. . . .

However, it is the volume of the duty exemption that satisfies this requirement. The 9000 ton exemption from the supplemental duty would have represented 2.7 percent of total imports in 1998, before application of the line pipe safeguard. The United States expected the measure to result in a decrease in the total volume of imports. Therefore, any country reaching the 9000 ton limit of the exemption would account for more than three percent of total imports. Thus, a developing country would only fall subject to the 19 percent tariff in conditions under which it was permissible under Article 9.1 for the United States to impose such relief. Therefore, Korea has failed to meet its burden of proof for the claim that the United States acted inconsistently with Article 9.1.

G. Miscellaneous Arguments Raised By Korea

1. Korea Has Incorrectly Stated The Standard For A Panel's Exercise Of Judicial Economy.

228. The United States considers it inappropriate for the parties or the Panel to adopt views regarding judicial economy at this stage of the dispute. However, we would like to draw to the attention of the Panel an omission from Korea's statement of the standard for exercising judicial economy under the WTO Agreement. In its submission, Korea states:

> where multiple violations are claimed regarding two independent actions – as in this case, concerning both the investigation and the safeguard measure – the resolution of the violation of one action does not necessarily moot the claims regarding the other separate action.[252]

229. Korea continues to cite several panel and Appellate Body reports, but omits the prior reports on disputes regarding safeguard measures, which would seem to be the most relevant to this dispute. We note that in *US – Wheat Gluten*, the Appellate Body reaffirmed its view expressed in *Argentina – Footwear* that

> In short, we considered that since the safeguard measure at issue was inconsistent with Articles 2 and 4 of the *Agreement on Safeguards*, there was no need to go further and

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[251] Korea's First Written Submission, para. 181.

[252] Korea's First Written Submission, para. 105.

examine whether, in addition, the measure was also inconsistent with Article XIX:1(a) of the GATT 1994. The inconsistency, as we said, deprived the measure of legal basis.[253]

2. Korea Has Conceded That the USITC Investigation Demonstrated the Existence of Unforeseen Developments.

230. In its submission, Korea claims that "[n]o unforeseen circumstances were identified by the Untied States, nor do any such circumstances exist in the record of the case."[254] However, earlier in the same submission Korea states that in 1997 and early 1998, "[e]xpectations of both importers and the domestic industry were that demand would continue to be strong."[255] It then continues to state that "in late 1998 and early 1999, oil prices collapsed."[256] Thus, Korea's own characterization of the record demonstrates that a development – the "collapse" in oil prices – was not expected – *i.e.*, was unforeseen. In short, it has not only failed to present a *prima facie* case that the record reflects no unforeseen developments, it has actually demonstrated the opposite.

231. Korea cites no evidence in support of these observations. One importer reported that domestic producers "misjudged the market" and built up large inventories,[257] demonstrating Korea's point that domestic producers had high expectations going into 1998. However, even more than the collapse in oil prices, the record indicates the importance of the East Asian financial crisis – another unforeseen development – in motivating supplying countries to increase shipments to the United States.[258]

3. Korea's Article 11 Claim That the United States Failed to Establish the Existence of an "Emergency Situation" Is Redundant.

232. Nothing in the Safeguards Agreement or Article XIX requires a showing that imports present an "emergency situation," as Korea claims.[259] Rather, the Safeguards Agreement and Article XIX set forth the conditions under which a member may take the "emergency action" provided under Article XIX, namely, imposition of a safeguard measure.

233. As we have described above, the USITC found that increased line pipe imports presented the elements necessary for imposition of a safeguard remedy – a rapid increase in the volume of imports that caused an overall impairment to the condition of the domestic industry. Import and domestic prices both plummeted. As a result, domestic producers' profits at the end of the investigation period were 10.8

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[253] *US – Wheat Gluten (AB)*, para. 181.

[254] Korea's First Written Submission, para. 318.

[255] Korea's First Written Submission, para. 292.

[256] Korea's First Written Submission, para. 293.

[257] USITC Report, p. II-67.

[258] USITC Report, p. II-66 ; Petition for Relief Pursuant to Section 201 of the Trade Act of 1974, As Amended, pp. 16-19 (30 June 1999) (Exhibit USA-7); Post-Hearing Brief of Petitioners, pp. 49-50 (Exhibit USA-4).

[259] Korea's First Written Submission, paras. 319-322.

percentage points lower than their previous low.[260] In meeting the criteria of the Safeguards Agreement and Article XIX, the United States established that there was an "emergency" within the meaning of Article XIX. These statistics show that an emergency existed in the ordinary sense of the word, too.

4. Korea Has Failed Meet Its Burden of Showing That the United States Failed to Provide the Meaningful Opportunity for Prior Consultations Required Under Article 12.3.

234. In its Article 12.1(b) supplemental notification of 25 January 2000, the United States announced its preparedness to consult with any Member having a substantial interest as an exporter of line pipe. As Korea notes, it first took advantage of this opportunity on 25 January 2000. Korea admits that it received notice of the measure that the President proposed to apply on 11 February, 17 days before the date the measure was scheduled to take effect.

235. Article 12.3 obliges a Member proposing to apply a safeguard measure to provide "adequate opportunity for prior consultations." The Appellate Body has found that this obligation

> requires a Member proposing to apply a safeguard measure to provide exporting Members with sufficient information and time to allow for the possibility, through consultations, for a meaningful exchange on the issues identified. To us, it follows from the text of Article 12.3 itself that information on the *proposed* measure must be provided in *advance* of the consultations, so that the consultations can adequately address that measure.[261]

236. We note, as have both the Appellate Body and Korea, that "safeguard measures were intended by the drafters of the GATT to be matters out of the ordinary, to be matters of urgency, to be, in short, 'emergency actions.'"[262] The obligation must be interpreted in light of this object and purpose of the Safeguards Agreement and Article XIX.

237. Article 12.3 requires the provision of an *opportunity* for prior consultations, rather than requiring consultations themselves. "Opportunity" means "[a] time or condition favourable for a particular action or aim; occasion, chance."[263] Thus, a Member satisfies the Article 12.3 obligation by providing a time or chance for consultations by providing necessary information and making itself available for consultations. Since the consultations cover "emergency" action, tight time frames will obviously be necessary.

238. The United States complied with this obligation by making itself available, as it announced in its supplemental Article 12.1(b) notification. It did not foreclose the possibility of further consultations following the President's announcement of the safeguard measure. Moreover, the press announcement of 11 February provided the information a Member would need to conduct consultations under Article

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[260] USITC Report, p. II-27.

[261] *US – Wheat Gluten (AB)*, para. 136.

[262] *Argentina – Footwear (AB)*, para. 93; Korea's First Written Submission, paras. 319-322.

[263] The New Shorter Oxford English Dictionary, p. 2009 (rare and inapplicable definitions omitted).

12.3.[264] In light of the emergency nature of the action, this schedule presented Korea with an adequate opportunity to request consultations.[265] That it failed to seize this opportunity is Korea's fault, and does not establish a failure by the United States to comply with its obligations under the WTO Agreement.

5. Korea Has Failed to Meet Its Burden of Showing That the United States Did Not Endeavor to Maintain a Substantially Equivalent Level of Concessions Under Article 8.1.

239. As Korea observes, Article 8.1 is explicitly linked to Article 12.3. Failure to observe the Article 12.3 obligation also makes a Member inconsistent with its obligations under Article 8.1. Korea rests its entire claim with regard to Article 8.1 on the claimed violation of Article 12.3. As we showed in the preceding section, it has failed to prove that claim. Therefore, Korea has failed also to meet its burden of proof with regard to Article 8.1.

IV. PROCEDURAL ARGUMENTS

A. Korea Provides No Basis For The Panel To Request Confidential Information From The United States.

240. Korea asks the Panel to request immense quantities of confidential information from the United States – the entire confidential record before the USITC and all papers used in deciding the nature of safeguard measure to apply. However, Korea has nowhere established that any of this information is either necessary or appropriate to the Panel's evaluation of its claims. The voluminous nonconfidential information on the record will allow the Panel to address each of Korea's arguments. If the Panel considers additional information necessary to its deliberations, the United States can meet that need with nonconfidential summaries or indexed data of the kind provided in the U.S. letter to the Panel of 16 February 2001 (February 16th Letter), which Korea itself admits is acceptable for most purposes.[266] The sole inadequacy that Korea alleges for this data – that it does not reveal import trends relative to domestic production – is entirely illusory, as we show below. Thus, granting Korea's request would add nothing to the Panel's deliberations.

241. Requesting confidential information would, however, burden the United States and the Panel. The Panel would need to devise procedures for the protection of proprietary information, adjudicate

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[264] The press release indicates the duration of the measure, the level of the supplemental duty, the schedule for liberalization, and the amount of imports from each country eligible for the exclusion. Statement by the Press Secretary, 11 February 2000 (Exhibit KOR-16). The prior notifications described the product and proposed date of introduction of the measure. G/SG/N/8/USA/7/Suppl.1 (25 January 2000); G/SG/N/8/USA/7 (11 November 1999).

[265] In fact, the United States met with representatives of the European Communities during this period.

[266] Korea's First Written Submission, para. 64 ("Korea can accept the United States data in indexed form with respect to the absolute import trends, apparent consumption, and domestic shipments. . . .").

disputes over whether a party inappropriately released such information, and scrutinize its own documents to protect against disclosure. The United States would have to obtain the consent of all 96 parties that submitted confidential information to the USITC before providing the information to the Panel, a burden which will detract from its ability to defend itself in this dispute.

242. Thus, Korea has provided no basis for the Panel to consider confidential information as "necessary and appropriate" to this dispute, the prerequisite to requesting such information under Article 13.1 DSU. The Panel should accordingly reject Korea's suggestion to request confidential information.

1. As The Panel Recognized, It Should Invoke Article 13.1 DSU Only To Request Information That Is Otherwise Unavailable, And Should Rely On Nonconfidential Information To The Extent Possible.

243. Article 13.1 DSU authorizes a dispute settlement panel to request Members to provide "such information as the panel considers necessary and appropriate." However, Article 3.2 SGA requires that confidential information provided to the competent authorities during a safeguard investigation "shall not be disclosed without permission of the party submitting it." The Appellate Body has recognized that the potential conflict between these two provisions presents "a serious systemic issue."[267] Faced with this issue, the Panel correctly recognized that it "should show appropriate restraint in the exercise of its authority under Article 13.1 of the DSU to seek confidential information from a party."[268]

244. Several considerations support the Panel's decision to exercise restraint. Under Article 13.1 DSU, a panel's authority to request information extends only to information that the panel considers "necessary and appropriate." "Necessary" means "[t]hat which cannot be dispensed with or done without; requisite, essential, needful,"[269] and "appropriate" means "specially suitable . . . proper, fitting."[270] The provision appears in the section of the DSU dealing with resolution of disputes by panels. Thus, a panel only has authority to request such information as is essential for resolution of the dispute before the panel and suitable for use in that dispute.

245. By definition, if the dispute can be resolved without reference to a piece of information, that information cannot be considered "necessary" to resolution of a dispute. There are three circumstances in which information is not necessary in this sense.

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[267] *Wheat Gluten (AB)*, para. 170. The Appellate Body noted its "strong agreement" with the panel's observation that this issue involved "the relationship between, on the one hand, the confidentiality obligations under Article 3.2 SA of a Member's investigating authorities with respect to confidential information obtained in the course of a domestic safeguards investigation and, on the other hand, the duties of Members when faced with a panel request for such confidential information under Article 13 DSU." *Wheat Gluten (Panel)*, para. 8.11.

[268] Letter from Dariusz Rosati to Man Soon Chang & Rita Hayes, p. 2 (8 February 2001) ("February 8th Letter")

[269] The New Shorter Oxford English Dictionary, p. 1895 (Clarendon Press 1993).

[270] The New Shorter Oxford English Dictionary, p. 103.

246. First, a piece of information is not necessary if it is not relevant to the issue under dispute. The Panel recognized this principle in rejecting Korea's request for the full confidential record on the grounds that the request "could encompass confidential information that is without relevance to the claims advanced by Korea in this dispute."[271]

247. Second, the information is not necessary if the claim to which it is related is not in dispute. Under the DSU, the party asserting a claim bears the burden of asserting a *prima facie* case, which consists of evidence and argument sufficient to establish a presumption that the measure is inconsistent with a covered agreement.[272] If the evidence and argumentation submitted by the complaining party does not meet that burden, there is no need for the panel to address the claim, and any additional information related to that claim is not needed to resolve the dispute. As the Appellate Body found in *Japan – Varietals*, it would be inappropriate for a panel to create a claim for a party that has failed to meet the requisite burden of proof:

> [P]anels have a significant investigative authority. However, this authority cannot be used by a panel to rule in favour of a complaining party which has not established a *prima facie* case of inconsistency based on specific legal claims asserted by it.[273]

The Appellate Body reaffirmed this view in *Canada – Aircraft*, finding that a panel acts "erroneously" when it "relieve[s] the complaining Member of the task of showing the inconsistency of the responding Member's measure."[274]

248. Third, the information is not "necessary" if other evidence available to the panel would allow a resolution of the claims in dispute. In *Canada – Aircraft*, the panel decided that

> We did not consider it appropriate to seek any information before receiving at least the first written submissions of both parties. We considered that it was only on the basis of these first written submissions that we could properly determine what, if any, additional information might need to be sought.[275]

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[271] February 8th Letter, p. 2.

[272] *Appellate Body Report on United States - Shirts and Blouses from India*, adopted on 23 May 1997, WT/DS33/AB/R, p.16.

[273] *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, para. 129 ("*Japan – Varietals*").

[274] *Canada – Aircraft (AB)*, para. 194. The Appellate Body also concluded that a responding Member cannot justify refusing to provide requested information on the grounds that the complaining Member has not established a *prima facie* case. *Ibid.*, para. 192. However, this logic cannot be read as indicating that a Panel may request information that is not necessary. If that were the case, then the word "necessary" – which appears twice in Article 13.1 in characterizing the information that a Panel may request – would be deprived of all meaning.

[275] *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, para. 9.50 (14 April 1999). The Panel's request for additional information is inconsistent with this interpretation of

(continued...)

In short, whether information is "necessary" within the meaning of Article 13.1 DSU depends on the record before the panel. If the record is sufficient, there is no need for additional information.

249. The panel in *Lamb Meat* provides a good example of this principle. One of the complainants requested certain confidential information from the USITC investigation. The United States submitted indexed data based on that information. The panel concluded that

> Having carefully reviewed and analyzed the indexed information, we have found that it is adequate and sufficient for purposes of our review of the USITC's investigation and determination pursuant to our terms of reference. As the complaining parties raise no objection to the US decision to provide the requested data in indexed form, we consider that Australia's request for information is moot and does not need to be dealt with further.[276]

Thus, substitute information provided by the defending party may remove the need to request a particular piece of information.

250. Finally, we note that panels typically avoid reliance on confidential information where possible.[277] There are several good reasons for this practice. If the panel uses confidential information, it must delete the information from the public version of the report, which burdens the panel and limits the usefulness of the report to other Members. Information submitted in a safeguards case reveals facts such as prices and production costs, which could harm the submitters if revealed to their competitors. This highly sensitive information requires a greater level of protection than is normally the case in WTO proceedings, placing a greater burden on the panel and the parties. In addition, the acceptance of confidential information may force the panel to adjudicate disputes over its treatment. Such a dispute recently forced the law firm advising a Member to withdraw from an appeal before the Appellate Body.[278]

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[275] (...continued)
Article 13.1. *See* February 8th Letter. Although the United States believes that the Panel overstepped its authority in requesting additional information before all parties had submitted their briefs, it complied with that request in a spirit of cooperation with the Panel.

[276] *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat From New Zealand and Australia*, WT/DS177/R, para. 5.65 (21 December 2000).

[277] *E.g., Thailand – Anti-dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams From Poland*, WT/DS122/R, para. 7.67 (28 September 2000) ("[A] panel clearly may refer to the confidential version of the application. However, in light of the particular arguments of Poland . . . we consider that the non-confidential version of the application provides a sufficient basis for our examination under Article 5.2 of the AD Agreement in this case."); *United States – Imposition of Countervailing Duties on Certain Hot-rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/R, para. 6.7 (23 December 1999) ("we do not consider it necessary to request the relevant information from the United States. In our view, the present dispute can be resolved without reference to the precise facts surrounding the Richemont spin-off in *Stainless Steel Sheet and Strip.*").

[278] *Thailand – Anti-dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel*
(continued...)

251. In a similar vein, requests for confidential information place a significant burden on the defending party. In the *Line Pipe* investigation, the USITC received confidential information from 96 parties – 14 U.S. producers, 23 U.S. importers, 19 foreign producers, and 40 U.S. purchasers.[279] None of them consented in advance to the disclosure of their information to a WTO panel or to the Government of Korea. Depending on the information sought, the United States could have to contact each of these parties, which would impede its ability to prepare its submissions and oral presentations to the Panel.

2. Korea's Requests for Confidential Information Disregard the Requirements of Article 13.1 DSU and Improperly Reverse the Established Burden of Proof.

252. Korea's requests for confidential information show a misunderstanding of the Article 13.1 DSU standard and the burden of proof. In addition, Korea's entire approach to this question is inconsistent with the Article 3.10 DSU instruction that parties not treat dispute settlement as a "contentious act."

253. At their broadest, Korea's requests rest on the proposition that confidential information is "necessary to Korea's defense,"[280] "essential to Korea's claims regarding the measure," or "will assist the Panel in its review of" a claimed inconsistency with the Safeguards Agreement.[281] These statements do not satisfy the criteria of Article 13.1 DSU, which authorizes a request for additional information if *the panel* considers such information to be necessary and appropriate. A mere allegation by the complaining party does not by itself provide a basis for the Panel to reach a reasoned conclusion on this question. Indeed, if a claim of necessity were sufficient, the complainant could control the fact-gathering process, which would nullify the role that Article 13.1 DSU accords to the Panel.

254. Moreover, these statements imply that Korea's role in the presentation of evidence ends with the enumeration of its claims that the U.S. safeguard measure is inconsistent with the WTO Agreement. This view appears most clearly in the statement that "[i]t should be the burden of the United States to establish why the Panel does not need the full deliberative data and information on which the ITC relied for its decision making and which is now subject to review by the Panel."[282] However, the Appellate Body established in its earliest decisions that "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence."[283] In this dispute, it is Korea that

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[278] (...continued)
and H-Beams from Poland, WT/DS122/AB/R, para. 74 (12 March 2001) ("*Thailand – Angles*"). We note that in *EC – Poultry*, the confidentiality of material referenced in the panel's interim report was compromised, and the confidential information was removed from the final report. *European Communities - Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/R, para. 191 (12 March 1998).

[279] USITC Report, pp. II-11, II-31, and II-48, n. 111.

[280] The United States is puzzled at how information might be relevant to Korea's "defense" when it is, in fact, the complainant in this proceeding.

[281] Korea's First Written Submission, paras. 73 and 81.

[282] Korea's First Written Statement, para. 74.

[283] *US – Wool Shirts*, p. 17.

alleges that the nonconfidential information on the record is inadequate and, therefore, it falls to Korea to prove that point.

255. Korea also errs in assuming that confidential information is the sole option if the Panel considers that additional information is necessary and appropriate to evaluate the arguments raised by the Parties. In fact, Article 13.1 DSU authorizes the gathering of additional information in general. In invoking that article, panels have typically worked with both complaining and defending parties to identify the necessary information.[284] In this dispute, as demonstrated by the U.S. February 16th Letter, nonconfidential summaries or indexed data can satisfy a request for necessary information while avoiding a situation where the U.S. Article 13.1 DSU and Article 3.2 SGA obligations are in conflict.

256. In this regard, the United States notes that Korea has approached this problem in a manner inconsistent with the Article 3.10 DSU, which provides that the use of WTO dispute settlement procedures "not be intended or considered as contentious acts." Both the Panel and the Appellate Body have recognized the "important systemic consideration" presented by the Article 3.2 prohibition on Members releasing confidential information without the consent of the party that submitted the information.[285] However, Korea has continued to insist that only confidential information will satisfy its needs. Indeed, it has characterized U.S. efforts to reach a constructive solution to the problem as a "refusal" to cooperate with the Panel.[286]

257. Korea also makes careless accusations. In particular, it charges that 50 pages of information are omitted from the public version of its staff report. Korea bases this claim on the fact that the confidential version of the report has 116 pages, while the nonconfidential version published in the public report has only 69.[287] There is a simple explanation. The USITC double spaces the text of its confidential staff reports, but single spaces the more widely circulated public reports to reduce costs. This is the USITC's regular practice, and should be well known to Korea's attorneys, who have practiced extensively before the USITC.[288]

3. The U.S. February 16th Letter Provides The Information That The Panel Considered Necessary, And There Is No Need To Request Confidential Information On Import Quantities.

258. In its letter of February 8th, the Panel requested the United States to provide a table appended to Commissioner Crawford's injury views and data on imports of subject merchandise on a country-specific basis. In the same letter, the Panel rejected almost all of Korea's earlier requests for confidential

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[284] *E.g.*, *US – Lamb Meat*, paras. 5.63-5.65; *US – Wheat Gluten (Panel)*, paras. 8.7-8.12.

[285] Panel February 16th Letter, p. 2; *US – Wheat Gluten (AB)*, para. 170.

[286] Korea's First Written Submission, para. 93 and heading d.

[287] Korea's First Written Submission, paras. 72 and 219.

[288] *See* Kaye, Scholer, *International Trade* (Exhibit USA-8).

information, stating that "a panel should show appropriate restraint in the exercise of its authority under Article 13.1 of the DSU to seek confidential information from a party."[289]

259. The United States responded to the letter on February 16th by pointing out that most of the information requested by Korea was already present in Table 3 of the public USITC Report. For the remaining information, the United States provided two tables containing indexed data. The United States noted in the letter that the panel in *Lamb Meat* had found similar indexed information "adequate and sufficient for purposes of our review of the USITC's investigation and determination."[290] The Panel did not object to this response.

260. Korea now charges that this data is "not sufficient" and that the United States has violated its obligation to respond fully and promptly to panel information requests.[291] Its actions show otherwise – Korea itself admits that the data is acceptable "with respect to absolute import trends, apparent consumption, and domestic shipments,"[292] and cites it extensively.

261. The sole inadequacy alleged by Korea is that the February 16th letter does not "provide import trends relative to production."[293] This is the first time it has raised this concern. Korea's original request for confidential information nowhere identifies this statistic as "necessary" to the Panel's consideration of this dispute. Moreover, the Panel can analyze the relationship between production and subject imports based on nonconfidential production data in the USITC Report and the indexed data in the February 16th Letter.[294] There is no need for additional confidential data for these statistics. Thus, Korea's criticism of the indexed data is frivolous.

4. Korea's Requests for Confidential Information Provide No Basis for the Panel to Consider that the Confidential Information Requested is Necessary and Appropriate.

a. The Full Staff Report and All Papers Used in the Presidential Deliberative Process

262. In paragraphs 72-75 and 81, Korea requests the full confidential staff report, "the full confidential record of the ITC," and "any other deliberative documents which exist regarding the Presidents analysis of the measure." The Panel correctly concluded in its February 8th letter that this request "is unduly broad and could encompass confidential information that is without relevance."[295] The response of the panel in *Canada – Aircraft* to a similar request by the complainant is equally relevant in this dispute:

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[289] February 8th Letter, p. 2.

[290] *US – Lamb Meat*, para. 5.65.

[291] Korea's First Written Submission, paras. 64 (heading a) and 93 (heading d).

[292] Korea's First Written Submission, para. 64.

[293] Korea's First Written Submission, para. 64.

[294] USITC Report, Table 4, p. II-20.

[295] February 8th Letter, p. 2.

> Whereas more generalized requests for information (of the sort envisaged in Brazil's submission of 23 October 1998) may be appropriate for bodies such as commissions of enquiry, we do not consider them appropriate for a panel acting under Article 13.1 of the DSU.[296]

263. In addition, Korea claims that it must have the full report because it "has no way of knowing exactly what data, contained in the missing sections, is relevant to the Panel's review."[297] This is incorrect. The USITC's deletions of confidential data from the public report left almost all section headings and titles to tables and graphs intact, allowing the panel to identify the nature of the deleted confidential information.

b. Quarterly Price Data for Imported and Domestic Line Pipe

264. Korea contends that the USITC's confidential data on pricing is necessary to evaluate the ITC's conclusions regarding the relationship between imported and domestic prices and incidence of underselling. This request provides another example of Korea's unnecessarily contentious approach to this issue. The United States agrees that *additional* data on pricing is necessary and appropriate to the Panel's consideration of this dispute. However, that data need not be confidential. The United States proposes at the first panel meeting to explore ways in which confidential data could be summarized or indexed to provide the information that the Panel considers necessary and appropriate.

c. Financial Information on a Per-producer Basis

265. Korea claims that the Panel needs company-specific financial information to evaluate whether data for Lone Star Steel and Geneva Steel "improperly skewed overall industry data on profitability."[298] However, company-specific financial data is irrelevant to the Panel's evaluation of the USITC determination. Article 4.2(a) of the Safeguards Agreement requires an examination of the entire industry, not individual firms. Since the analysis proposed by Korea is inappropriate, the information necessary to conduct that analysis is plainly not "necessary and appropriate" in this dispute.

266. In addition, data on production costs, which underlie profitability calculations, are among the most sensitive categories of information to any producer. The United States believes the Panel should be especially circumspect in requesting such information.

267. Finally, as we noted above, the nonconfidential information before the Panel establishes that the inclusion of data for these two companies did not "skew" overall industry performance. Many companies experienced decreasing profitability and losses in 1998. Moreover, any problems experienced by Geneva resulted in part from the difficulties it experienced in line pipe sales and, therefore, were appropriately factored into overall industry performance.[299]

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[296] *Canada – Aircraft (Panel)*, para. 9.53.

[297] Korea's First Written Submission, para. 73.

[298] Korea's First Written Submission, para. 79.

[299] *See* Section III.E.1.b, above.

d. The USITC Recommendation on Remedy, Supporting Economic Memoranda, and the Confidential Report to the President.

268. The United States has identified five economic memoranda and two memoranda by the investigating staff in the USITC record for which there are no nonconfidential versions. Confidential versions of these materials were provided under protective order to counsel for all of the parties in the USITC investigation that qualified for access to such information. None of the parties to the investigation objected to the absence of nonconfidential versions from the record. The United States agrees that nonconfidential versions of these documents – but not the confidential information they contain – may be necessary and appropriate to the Panel's consideration of this dispute. Accordingly, we have prepared nonconfidential versions and included them in the appendices to this submission.[300]

269. The Confidential Report to the President consists of the confidential versions of the determination and remedy recommendation of the USITC, the views of Commissioner Crawford, the USITC Staff Report, and the memorandums listed above. It contains no additional information. These materials are otherwise on the record. Therefore, a copy of the Report to the President is not necessary to the Panel's resolution of this dispute.

5. Providing a Party's Confidential Information to the Panel Without the Party's Consent Would Be a Disclosure Prohibited by Article 3.2.

270. As we have noted, the *Wheat Gluten* panel concluded that the potential conflict between a Member's Article 3.2 obligation not to disclose confidential information and a panel's authority to request additional information presented "a serious systemic issue."[301] The Appellate Body stated its "strong agreement" with this view.[302] These findings indicate that both bodies found submission of confidential information to a panel to constitute a "disclosure" that, under Article 3.2, cannot proceed absent the consent of the party that submitted the information. If that were not the case, there would be no "systemic issue."

271. Yet Korea now argues that submission of confidential information to a panel is not a "disclosure" because standard panel procedures protect the information from disclosure. The ordinary meaning of Article 3.2 does not support Korea's interpretation. That provision states that confidential information "shall not be disclosed without permission of the party submitting it." The Oxford English Dictionary defines "disclose" as "[r]emove the cover from; expose to view . . . [m]ake known, reveal."[303] Similarly,

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[300] The five economic memoranda are: Memorandum EC-W-070 (Exhibit USA-9); Memorandum EC-W-071 (Exhibit USA-5); Memorandum EC-W-072 (Exhibit USA-10); Memorandum EC-W-073 (Exhibit USA-11); and Memorandum EC-W-074 (Exhibit USA-12). The two memoranda from the investigating staff are Memorandum INV-W-247 (Exhibit USA-3) and Memorandum INV-W-253 (Exhibit USA-13).

[301] *Wheat Gluten (Panel)*, para. 8.11.

[302] *Wheat Gluten (AB)*, para. 170.

[303] The New Shorter Oxford English Dictionary, p. 685 (quoting definitions 2 and 3; definitions 1 and 4 are not relevant).

Black's Law Dictionary defines disclose as "[t]o bring into view by uncovering; to expose; to make known; to lay bare; to reveal to knowledge; to free from secrecy or ignorance, or to make known."[304]

272. The Panel and Korea do not possess the confidential information. Therefore, to provide that information to the Panel or Korea would be "expose to view," "make known," and "reveal" the information *to the Panel and Korea*. That the Panel and Korea would not then disclose the information to third parties does not change the fact that submission to the Panel and any parties to the dispute itself constitutes a disclosure within the meaning of Article 3.2.

273. Korea argues that under U.S. practice, the provision of confidential information in a court or binational panel proceeding is not a "disclosure," but a "release" that does not require the consent of the submitting party. It then posits that submission to a panel is analogous to those situations and extrapolates that, therefore, U.S. practice establishes that release to a panel is not a "disclosure" within the meaning of Article 3.2. As an initial point, the distinction Korea draws between "release" and "disclosure" is invalid, as the terms are used interchangeably in U.S. law pertaining to confidential information in trade remedy proceedings.[305] However, Korea's analysis is flawed in additional ways.

274. First, U.S. law and practice do not provide for the disclosure of confidential information from a safeguards investigation to courts or binational panels. U.S. courts have jurisdiction solely over procedural flaws in a safeguards investigation, and not over the substance of the USITC determination. Furthermore, the USITC may not disclose confidential information from a safeguards investigation to any body – including the U.S. Congress or President – except with the consent of the submitting party.[306]

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[304] Black's Law Dictionary, 6th ed., p. 320 (West Publishing Co. 1991) (Exh. KOR-30). Interestingly, Korea cites only a portion of this definition ("to free from secrecy"). Korea's First Written Submission, para. 85. The full definition makes clear that something is "disclosed" any time that it becomes known to an individual, and not only when it becomes completely free from secrecy.

[305] For example, section 777(c) of the Tariff Act of 1930 is entitled "Limited Disclosure of Certain Proprietary Information under Protective Order." (Exhibit USA-14). The cross reference to this section in section 777(b)(1)(B) refers to "release" of information "in accordance with subsection (c)." This section is codified at 19 U.S.C. § 1677f.

[306] Under section 202(a)(8) of the Trade Act, section 332(g) of the Tariff Act of 1930 governs the handling of confidential information in a safeguards investigation. That provision requires the USITC to provide to the President or certain Congressional committees any information they request, with the caveat that

> the Commission may not release information which the Commission considers to be confidential business information unless the party submitting the confidential business information had notice at the time of submission, that such information would be released by the Commission, or such party subsequently consents to the release of the information.

Tariff Act of 1930, Section 332(g) (Exhibit USA-2). Thus, the statute prohibits any release or disclosure of confidential information unless the submitting party gave constructive consent by submitting the

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275. Second, even under U.S. antidumping and countervailing duty laws, which provide for judicial and binational panel review, the provision of confidential information to the parties and panelists in a binational panel proceeding process is characterized as "disclosure."[307] The same holds true for provision of confidential information to the parties in a court case.[308] The USITC does not accept confidential information in an antidumping investigation unless the submitting party consents in advance to such disclosure.[309] Private parties and binational panel members may obtain the disclosure of confidential information only if they agree to adopt measures sufficient to ensure its protection from disclosure to ineligible persons. Breach of these rules is subject to strict penalties, including disbarment from practice before a tribunal.[310]

276. Korea suggests that the USITC should have obtained consent for use in WTO panel proceedings at the time it gathered confidential information in the *Line Pipe* investigation.[311] This is not a realistic option. As the panel found in *Wheat Gluten*, the prohibition on disclosure of confidential information "encourages the fullest possible disclosure of relevant information by interested parties."[312] U.S. law and practice achieve this goal by assuring parties submitting confidential information that there are reliable procedures in place to prevent an improper disclosure, and meaningful sanctions to ensure compliance with those procedures. The USITC has found that the ability to describe these procedures and assure submitting parties that improper disclosure of information will be punished are key factors in obtaining voluntary compliance with requests for confidential information.

277. However, WTO panels' procedures for handling information change from dispute to dispute, and there are no sanctions if the representatives of Members fail to comply.[313] At least one violation of

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[306] (...continued)
information with the knowledge that it could be so released or gave actual consent later.

[307] Tariff Act of 1930, § 777(f).

[308] Tariff Act of 1930, § 516a(b)(2)(B) (Exhibit USA-15). This provision is codified as 19 U.S.C. § 1516a.

[309] Tariff Act of 1930, § 777(b)(1)(B)(ii). There is an exception to this requirement, but it applies only to information "that should not be released under administrative protective order." Under USITC regulations, information qualifies for the exception only if it is privileged, classified (*i.e.*, government confidential), or "there is a clear and compelling need to withhold [it] from disclosure." 19 C.F.R. § 201.6(a)(2) (Exhibit USA-16). The USITC has never accepted information under this exception.

[310] Tariff Act of 1930, §§ 777(c)(1)(B), 777(f)(2)-(4), 19 C.F.R. § 207.7(d) (Exhibit USA-16).

[311] Korea's First Written Submission, para. 92.

[312] *US – Wheat Gluten (Panel)*, para. 8.20.

[313] The Appellate Body stated in *Thailand – Angles* that "we have done all that is possible within our mandate under the DSU to address Thailand's concerns" about the improper disclosure of confidential information. *Thailand – Angles*, para. 76. Its actions consisted of (1) in a written ruling, noting the concerns of the party whose information was improperly disclosed; (2) conducting an inquiry; (3) providing a full account of all aspects pertaining to the issue; (4) making a finding that the

(continued...)

confidentiality requirements has already occurred.[314] Thus, the USITC believes that, if it required parties to consent in advance to the disclosure of confidential information to WTO panels, it would have more trouble obtaining such information. Companies that are not complainants or respondents in the proceeding – who may often provide the least biased sources of information – are often the most reluctant to cooperate. Thus, the approach suggested by Korea would reduce the quality of information in safeguard proceedings, surely an outcome the panel should reject.

B. Request of the United States for a Preliminary Ruling That Evidence Not Submitted to the USITC or Addressing Events After the Decision to Take a Safeguard Measure Is Not Admissible in This Dispute.

278. The United States requests that the Panel issue a preliminary ruling on the admissibility of new information, which was not part of the record considered in the safeguards investigation, that Korea either included or referenced in its first written submission. In many cases, the new information dates from *after* the application of the safeguard measure and describes conditions *after* the application of the measure. As such, the information is irrelevant to the Panel's deliberative process. We request that the Panel declare the new information to be inadmissible so that the parties to this dispute and the Panel can focus their attention on the relevant information.

279. The materials in question appears in the following text and exhibits of Korea's First Written Submission:

- Paragraph 261: Korea describes "price increases in late 1999 and early 2000" that were announced after the USITC's injury determination;
- Exhibit KOR-18, referenced in paragraphs 18 and 116: The exhibit describes a meeting between the Vice President of the United States and U.S. union leaders;
- Exhibit KOR-23, referenced in para. 32: The exhibit is a newspaper article from November, 2000, that describes economic cycles in the oil and gas industry;
- Exhibit KOR-29, referenced in paras. 50-54, para 162 (footnote 61), and para. 178: The exhibit contains import data for the period following application of the safeguard measure; and
- Exhibit KOR-45, referenced in para. 177: The exhibit contains the transcript for the hearing in another USITC proceeding, which occurred after application of the safeguard measure.

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[313] (...continued)
information was improperly disclosed; (5) rejecting an *amicus curiae* submission based in part on the improperly disclosed confidential information; and (6) at the oral hearing, noting the concerns of the party whose confidential information was improperly disclosed. If this is the extent of the Appellate Body's authority, meaningful sanctions are clearly not available. *Ibid.*, paras. 68-76.

[314] *See* WT/DSB/M/41, item 8 (26 February 1998). The legal representatives of a party transmitted confidential information provided by the other party to members of the public.

280. These materials or allegations were not on the administrative record before the USITC, nor were they among the materials considered by the President in deciding whether to take a safeguard measure. Accordingly, they are irrelevant to the Panel's consideration of the determination made by the USITC. Just as importantly, three of these categories of materials (Exhibits KOR-23, KOR-29, and KOR-45) date from after the United States had applied the safeguard measure. As such, they are not relevant to the evaluation of whether the United States acted consistency with Article 5.1 or 5.2(b).

1. Information Not on the USITC Administrative Record

281. As we note above, it is well established that a panel must make an objective assessment of the facts of the case and of the applicability and conformity with the relevant covered agreements. With regard to fact-finding, "the applicable standard is neither *de novo* review as such, nor 'total deference.' "[315] Korea has not put forward any alternative standard. However, its submission to the Panel of new information, which was not part of the U.S. administrative process, is directly contrary to this standard.

282. Under Article 3 of the Safeguards Agreement, it is a Member's competent authorities that investigate the facts. The USITC did so by sending questionnaires to foreign producers, importers, domestic producers, and purchasers. It also gathered other publicly available information and considered information that interested parties submitted, both through written submissions and testimony at the public hearings. We note that Korean parties participated extensively in the investigation and appeared at both hearings conducted by the USITC.

283. By submitting new information that was never before the USITC, Korea would have this Panel become another authority before which evidence could be submitted on the underlying facts. If that is permitted, the panel must first consider the new evidence and then weigh the new evidence against the evidence already on the record. This process is exactly the *de novo* review repeatedly condemned by the Appellate Body.

284. The materials that Korea included in its written statement demonstrate the pitfalls that a panel faces in entertaining new information. Evidence on the USITC record was subject to comment by the Commissioners, the USITC's expert personnel, legal advisors to the interested parties, and industry experts employed by the interested parties. For new information, such as that submitted by Korea, that expertise is mostly unavailable.

285. Moreover, allowing the submission of new evidence would harm the ability of competent authorities to conduct investigations under Article 3 of the Safeguards Agreement. It is hard to imagine a case in which some piece of information could not be obtained somewhere that was not before a competent authority. Interested parties could submit one set of information to the competent authorities and, upon challenge of the determination before the WTO, the interested Member could seek to relitigate the case based on a new set of information.

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[315] *EC – Hormones (AB)*, para. 116, n. 111.

286. Finally, the obligations that Article 3 imposes on Members considering the application of a safeguard measure have the effect of creating rights for the "importers, exporters and other interested parties" of other Members to

> present evidence and their views, including the opportunity to respond to the presentations of other parties and submit their views, inter alia, as to whether or not the application of a safeguard measure would be in the public interest.

Allowing a Member to subsequently present new evidence in the WTO dispute settlement process would nullify these rights, as only governmental parties would have an unfettered right to present evidence and views. In fact, if Members can reprise a safeguards investigation through dispute settlement, it renders the entire Article 3 process meaningless, a result inconsistent with the principle of effectiveness in treaty interpretation.[316]

287. Therefore, the Panel should find that all evidence not included in the USITC record is inadmissible for purposes of reviewing the USITC's determination.

2. Information on Events *After* the Decision to Apply the Line Pipe Safeguard

288. Korea's claims all stem from the actions of the USITC in its investigation and determination, and the decision of the President to apply the line pipe safeguard.[317] Both the USITC and the President based their actions on information before them at the time of the decision. Therefore, Exhibits KOR-18, KOR-23, KOR-29, and KOR-45 are irrelevant to the Panel's consideration of Korea's claims.

289. As the *Korea - Dairy* panel emphasized, a panel must assess whether the Member that applied a safeguard measure has "examined all relevant facts in its possession or which it should have obtained in accordance with Article 4.2 of the Agreement on Safeguards *at the time of the investigation*."[318] Since the USITC never possessed, nor could have obtained, data on future imports and events, or future analyses of market conditions, such materials are completely irrelevant to the panel's consideration of the investigation and determination of the USITC.

290. As we note above, the Article 3 obligations to conduct an investigation and to issue a report do not apply to a Member in its decision under Articles 2.1 and 5.1 of whether and to what extent to impose a safeguard measure. However, that does not mean that subsequent events can invalidate a safeguard that satisfied the requirements of the Safeguards Agreement at the time of its application.

291. In evaluating the decision to take a safeguard measure in *Korea – Dairy*, the Appellate Body stated that Article 5.1 "imposes an *obligation* on a Member applying a safeguard measure to ensure that the measure applied is commensurate with the goals of preventing or remedying serious injury and of

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[316] *Argentina – Footwear*, para. 88, n. 76 ("An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.").

[317] *See generally* Request for Establishment of a Panel by Korea (14 September 2000).

[318] *Korea – Dairy (Panel)*, para. 7.55 (emphasis added).

facilitating adjustment."[319] Moreover, the Appellate Body also stated that, in the limited circumstances in which a Member must justify a safeguard measure, the justification must be based on information available at the time of the decision to take the measure.[320]

292. The text of the Safeguards Agreement supports this conclusion. The decision whether a measure "*is* commensurate" with the goals of Article 5.1 can only be made at the time of the decision. The choice of the present tense is significant. The Appellate Body did not require assurance that the measure "will be" commensurate. Nor does the Safeguards Agreement create a continuing obligation to revisit the measure to ensure conformity with Article 5.1. Instead, Article 7 requires periodic reviews – at the midpoint of the planned period of application and prior to any extension of the measure – to determine whether circumstances justify continued application.

293. Furthermore, a consideration by the Panel of information pertaining to the period after application of the measure does not make sense. As with any information that was not considered by the competent authorities or the Member at the time of a determination or decision, future information has not been fully examined. It is also out of context. For example, since there has been no comprehensive investigation of the post-safeguard period, it is impossible to determine whether the observed import patterns are driven in whole or in part by factors unrelated to application of the line pipe safeguard. Thus, even if post-decision information were relevant to an evaluation of the decision to take a safeguard measure, it would be impossible to determine the weight to accord such information.

3. The Panel Has the Authority to Make a Preliminary Ruling on the Admissibility of Information.

294. The Panel, as part of its basic authority to regulate the proceedings before it, may determine that the information described above is irrelevant and inadmissible. The Appellate Body found in *Shrimp-Turtle* that:

> the DSU accords to a panel established by the DSB, and engaged in a dispute settlement proceeding, ample and extensive authority to undertake to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts.[321]

In this case, Korea has placed before the Panel new information that is irrelevant to the claims under review, and made arguments based solely on that information. As long as that information, and any arguments derived from it, are before the Panel, the United States must respond. The effort will detract from its present arguments and answer the Panel's inquiries on other relevant issues.

295. Therefore, we request the Panel to issue a preliminary ruling:

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[319] *Korea – Dairy (Panel)*, para. 96 (emphasis in original).

[320] *Korea – Dairy (AB)*, para. 98.

[321] *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, para. 105 (12 October 1998).

(1) finding that the new information listed in the introduction to this section is inadmissible;

(2) requesting Korea to remove the new information from its first written submission and to delete any arguments based on that information; and

(3) instructing the Parties that the new information, and any arguments based on that information, will not be considered by the Panel.

V. CONCLUSION

296. For the foregoing reasons, the United States submits that its safeguard measure on imports of line pipe satisfies U.S. obligations under the Safeguards Agreement and GATT 1994. Accordingly, the Panel should reject Korea's claims to the contrary.

LIST OF EXHIBITS

USA-1	Sections 201-202 of the Trade Act of 1974, as amended; codified at 19 U.S.C. § 2251, *et seq.* ("Trade Act")
USA-2	Sections 330-332 of the Tariff Act of 1930, as amended; codified at 19 U.S.C. § 1330-1332.
USA-3	USITC Memorandum INV-W-247
USA -4	Petitioners' Posthearing Brief, pp. 36-39 and 49-50 (7 October 1999)
USA-5	USITC Memorandum EC-W-071
USA-6	Dictionary of International Trade Terms, p. 157 (William S. Hein & Co., Inc. 1996)
USA-7	Petition for Relief Pursuant to Section 201 of the Trade Act of 1974, As Amended, pp. 16-19 (30 June 1999)
USA-8	Kaye, Scholer, *International Trade.*
USA-9	USITC Memorandum EC-W-070
USA-10	USITC Memorandum EC-W-072
USA-11	USITC Memorandum EC-W-073
USA-12	USITC Memorandum EC-W-074
USA-13	USITC Memorandum INV-W-253
USA-14	Section 777 of the Tariff Act of 1930, as amended; codified at 19 U.S.C. § 1677f.
USA-15	Section 516a of the Tariff Act of 1930, § 516a(b)(2)(B); codified as 19 U.S.C. § 1516a.
USA-16	Regulations of the USITC, Sections 201.6 and 207.7; codified at 19 C.F.R. §§ 201.6 & 207.7
USA-17	*Circular Welded Carbon Quality Line Pipe*, Inv. No. TA-201-70, USITC Pub. 3261 (December 1999)